THE CRIMINAL COURTS

By REGINALD HEBER SMITH
and HERBERT B. EHRMANN

PART I
OF THE CLEVELAND FOUNDATION SURVEY OF
CRIMINAL JUSTICE IN CLEVELAND

Price $1.00

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BY

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PART I

OF THE CLEVELAND FOUNDATION SURVEY OF
CRIMINAL JUSTICE IN CLEVELAND

FOREWORD

THIS is the first section of the reports of the Cleveland Foundation Survey of Criminal Justice in Cleveland. Other reports to be published are:

Police, by Raymond Fosdick
Prosecution, by Alfred Bettman
The Treatment of the Convicted, by Burdette G. Lewis
Medical Science and Criminal Justice, by Dr. Herman M. Adler
Newspapers and Criminal Justice, by M. K. Wisehart
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The reports are being published first in separate form, each bound in paper. About November 1 they will be available in a single volume, cloth bound. Orders for subsequent separate reports or the bound volume may be left with book-stores or with the Cleveland Foundation, 1202 Swetland Building.

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CHAPTER I

THE FUNDAMENTAL TROUBLE

ANALYSIS of the administration of criminal law in Cleveland reveals a failure of self-government in one of the city's most vital functions. It does not, or should not, matter to the citizens of Cleveland that other large American cities have failed, for Cleveland has at times won national recognition for its pride and leadership in civic affairs. Moreover, the success of the democratic experiment in America requires that no community shall tolerate conditions found to exist in this city once the facts are known.

Care must be taken not to ascribe the Cleveland failure to the evil work of individuals alone, although undoubtedly there has been exploitation by those whose elimination would have a salutary effect. Their removal, however, would not effect a cure. On the contrary, popular clamor for a victim diverts attention from the real difficulties, which are not capable of so easy and dramatic a solution. The conditions which make exploitation possible must be removed before permanent improvement can be effected.

These conditions are, first, the persistence of a system of criminal justice become obsolete and wholly inadequate through the rapid growth of urban population and modern industrial life; and, second, the unorganized, uninformed, and socially indifferent attitude of the more intelligent portion of the citizenship, brought about by concentration on material prosperity to the exclusion of civic life. The pages of this report tell the story, often in bare statistical form, of how an inadequate system is made use of to defeat the ends of criminal justice in the absence of an informed and watchful social conscience.

Signs are not wanting that Cleveland is waking up to this situation. A growing perception and outspokenness on the part of some judges and other public officials is one of a number of such symptoms. Men of ability are coming forward to devote their services to the public interest; the Bar Association, the press, and the legislators from Cuyahoga County

are becoming more alert. The "crime wave" and several notorious cases have aroused the community to action, with the result that Cleveland has taken the unusually courageous step of asking for and publishing a survey of its administration of justice. It remains to be seen whether this interest is a mere spasmodic outburst of energy, or whether Cleveland is really ready to undertake the task of changing underlying conditions, and, having changed the system, its sources and its atmosphere, to maintain an aroused and informed civic conscience which will prevent a relapse to old evils.

CHAPTER II

STRUCTURE OF THE PRESENT SYSTEM

THE present method of administering criminal law is built upon two court systems, two prosecutors' offices, and a grand jury.

The criminal division of the Municipal Court has jurisdiction over misdemeanors,[1] violations of city ordinances, and preliminary examinations in cases of felony. Its misdemeanor jurisdiction is reviewable by the Court of Appeals or the Common Pleas Court for errors of law only, so that the system avoids the evil of permitting two trials on the merits, which is so common to American cities with inferior and superior courts. A defendant who desires a jury trial must claim it seasonably[2]—but there are relatively few such trials.[3] The geographic jurisdiction of the Municipal Court is limited to the city of Cleveland.

When a person is arrested for a felony, the Municipal Court holds a preliminary examination, unless the defendant waives his right to such examination. If the court finds there is probable cause, or the examination is waived, the court has the power to "bind over" to the grand jury. The grand jury sits practically continuously except during July and August, which is another advantage over many cities. The prosecuting attorney for Cuyahoga County then presents evidence to the grand jury, and if a *prima facie* case is made out, the grand jury returns a "true bill," stating the crime for which the defendant is indicted, after which the case proceeds before a judge of the Common Pleas Court through the usual stages of arraignment, plea, trial, and disposition. In all its essentials the theory of handling felonies is the same as it has been for hundreds of years, and is now used, in village and metropolis alike, throughout the country.

The Common Pleas Court has geographic jurisdiction throughout Cuyahoga County, so that some of its cases come from petty magistrates

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[1] Misdemeanors are violations of State laws not punishable by imprisonment in the penitentiary.

[2] Ohio General Code 1579, Section 24.

[3] In 1920, out of 2,608 cases, there were only 15 jury trials.

outside the city of Cleveland. The number of such cases is not large.[1] Occasionally the grand jury returns an indictment without prior proceedings, usually where it would be inadvisable to warn the defendant by proceedings in an inferior court.[2]

This is the general structure of the Cleveland system. We now observe how it works in practice.

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[1] Among all cases begun in the Common Pleas Court in 1919, the number of such cases was 98, or 3.9 per cent.

[2] Among all cases begun in the Common Pleas Court in 1919, the number of original indictments was 306, or 12.1 per cent.

CHAPTER III

THE SYSTEM IN PRACTICE

Influences Evoked by Arrests

A STUDY of the practical working of criminal justice should begin with some consideration of the powerful dynamic agency released through the arrest of a man upon a serious charge. The instinct of self-preservation sometimes leads a felon to commit murder in resisting arrest, and once in custody, his whole being is concentrated upon the single idea of getting out. Parents and relatives, who had apparently given him up as a lost soul, rally loyally to rescue him from the penitentiary, often pledging their last cent for the purpose. Few felons are so disreputable that there is no one to fight for their liberty.[1] The friends who do not come forward willingly are forced into line by every human incentive. It is often surprising how far and into what regions this active agency can penetrate. "Beginning in the slums, among the recidivists," observed the oldest judge on the Cleveland bench, "waves of influence are set up that reach higher and higher until they envelop respectability. Men with spotless reputations, whose motives cannot be doubted, will urge a judge to parole a professional criminal. How did they get there? The trail leads back to the slums—investigate the twilight zone."[2]

The Professional Criminal Lawyer

Another factor to be considered, partly the result of the foregoing and partly the result of many other causes, is the professional criminal lawyer. A poll of the bar of Cleveland shows that most lawyers dislike criminal practice, partly because of a feeling that it is detrimental to civil practice and partly because of professed ignorance or dislike of the required technique. The result is that a large part of the lucrative practice in the

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[1] During April, 1921, a number of gangsters were arrested for murder. The following day an audacious payroll robbery occurred. "Raising money for the boys' defense," remarked an old detective knowingly.

[2] Following a most atrocious double murder and payroll robbery, a number of typical pool-room habitués were arrested as suspects. Bail of $40,000 each for some of these men was promptly furnished from most respectable sources.

criminal courts goes to a small number of specialists. Considering all the Common Pleas criminal cases begun in 1919, we find 244 lawyers appearing in a total of 363 cases, no single lawyer appearing in more than three cases, against 89 lawyers appearing in a total of 842 cases,[1] no one appearing *fewer* than three times. About one-fourth of the privately retained lawyers appeared in more than two-thirds of the cases. Twenty-eight lawyers appeared 10 or more times each in 492 cases, or one-twelfth of the lawyers in considerably more than one-third of the cases. Moreover, many of this small group of professional criminal lawyers are in politics. Were the system as invulnerable as Achilles, these political criminal lawyers would find the penetrable heel.

Opposed to these forces is the prosecutor's office, consisting chiefly of underpaid and often inexperienced assistants, with no personal interest in the cases, and without a tradition of energetic public service. Under such conditions the best system of criminal justice would be subjected to strain, and it is not surprising that the present antiquated system has broken down.

Too Many Steps in the Procedure of Justice

To a layman, or a lawyer in civil practice, the administration of criminal law means a jury trial in open court. The civil lawyer understands that in this ordeal by battle between the prisoner's champion and the prosecutor, the State is under a burden of strict rules of evidence which make convictions difficult to obtain. He may also realize the disparity in ability between the poorly paid prosecutor and the retained private lawyer, and the manifest failure of the State to assure adequate preparation for trial.[2] What he fails to grasp fully, and what the layman also does not realize, is that the dramatic episode of a trial is relatively only a small part of the system.

In the first place, many offenses are committed for which no one is arrested. This is a problem of police administration. After an arrest is made, the police may release the prisoner because of insufficient evidence, or turn him over to other authorities. In Cleveland there is a practice in the police department of releasing, or "golden-ruling," first offenders, but this practice is rarely used in felony cases. These matters are all questions of police policy. Once a man is held, however, the judicial processes begin to operate. The police prosecutor may report "no

[1] This is exclusive of cases where counsel was appointed by the court to aid indigent prisoners and cases in which more than one lawyer appeared for the defense.

[2] This is dealt with in detail in the report on the prosecutor's office.

papers," in which case the prisoner is released without further proceeding. Or the police prosecutor may move to "nolle"—*i. e., nolle prosequi*[1]—the case, which also liberates the prisoner. The lower court may find that there is "no probable cause" and discharge the prisoner. The grand jury may fail to indict a defendant by returning a finding of "no bill." If a man is indicted, the prosecuting attorney in the Common Pleas Court may move to "nolle" the case. The defendant may plead guilty, either on arraignment or by change of plea later. In addition, among the cases begun in 1919, a number disappeared in ways not properly classed as dispositions; for instance, those who were never arrested after indictment and those who jumped their bail in the Common Pleas Court.

A diagram based upon a study of all cases begun in the Common Pleas Court during 1919, supplemented with information supplied by the police department with respect to disposition of felony cases outside of this court, would look approximately as in Diagram 1.

A more detailed picture may be gathered from Table 1.

Classifying these dispositions under general heads, and adding the events that may occur before a case reaches the Common Pleas Court and after conviction, we have the following enumeration of different methods by which it is possible for an offender to escape under the guidance of an expert:

FELONIES AND MISDEMEANORS (MUNICIPAL COURT)

1. "No papers"
2. "*Nolle prosequi*"
3. Discharge, want of prosecution
4. Discharge after hearing

Misdemeanors—Municipal Court

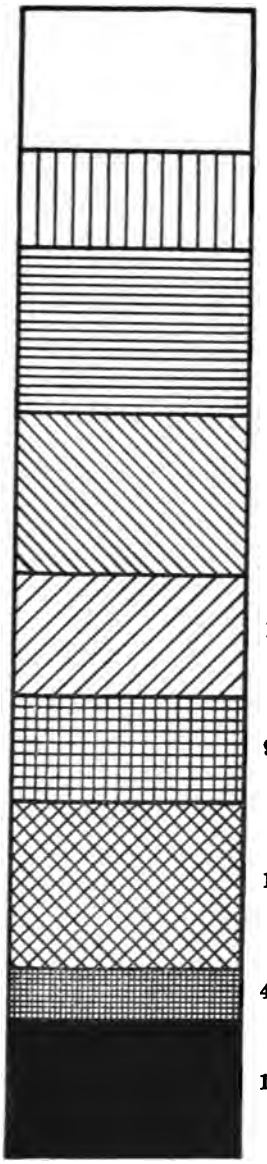
5. Suspended sentence
6. New trial
7. Appeal
8. Parole from workhouse

Felonies—Common Pleas Court

5. "No bill" by grand jury
6. Failure to arraign
7. "*Nolle prosequi*"
8. Discharge, want of prosecution
9. Not guilty after trial
10. Plea guilty of lesser offense
11. Suspended sentence
12. New trial
13. Appeal
14. Parole from institution
15. Pardon

Throughout this procedure there is always the possibility of the defendant jumping bail should his case assume a hopeless aspect.

[1] Literally and in practice this means, "I am unwilling to prosecute." This motion, which has a long history, is the secret of great power in the prosecutor's office.



Of 1,000 Felony Arrests—

127 were disposed of by the police

85 were "nolled" or "no-papered" by the police prosecutor

143 were discharged or dismissed or found guilty of a misdemeanor in Municipal Court

139 were "no-billed" by the grand jury

107 were "nolled" by the county prosecutor

91 made an original plea of guilty

148 changed the plea to guilty

42 were variously disposed of

118 came to trial

Diagram 1.—The disposition of each 1,000 cases of felony arrests

TABLE 1.—DISPOSITION OF FELONY CASES BEGUN IN 1919[1]

1919	Number of cases	Per cent. of total cases	Per cent. Common Pleas cases
1. Total cases	4,499	100.00	..
2. Disposed of by the police	572	12.71	..
3. "No papers" and "nolled," Municipal Court	382	8.49	..
4. Discharged, dismissed, or charges reduced to misdemeanors, Municipal Court	644	14.31	..
5. Bound over	2,901	64.48	..
CASES BEGUN IN 1919			
6. "No bill" by grand jury	697	15.49	..
7. Total disposed of in Common Pleas Court	2,539	..	100.0
8. Total disposed of on plea of defendant	1,215	..	48.0
9. Total disposed of not on plea of defendant	1,324	..	52.0
10. Subdivisions of 8:			
a. Original plea guilty	433	..	17.1
b. Original plea guilty lesser offense	22	..	0.9
c. Original plea not guilty, changed to guilty	550	..	21.7
d. Original plea not guilty, changed to guilty of lesser offense	193	..	7.6
e. Others	17	..	0.7
11. Subdivisions of 9:			
a. Nolled for all causes	536	..	21.1
b. Not arraigned	57	..	2.2
c. Bail forfeited	33	..	1.3
d. Dismissed or discharged	31	..	1.2
e. Trial, not guilty of felony	215	..	8.5
f. Trial, not guilty of misdemeanor	8	..	0.3
g. Trial, guilty of felony	293	..	11.6
h. Trial, guilty of misdemeanor	74	..	2.9
i. Others	77	..	2.9
Total	1,324	..	52.0
12. Subdivisions of 11 a:			
a. Nolled after commitment for insanity	2	..	0.1
b. Nolled after new trial granted	13	..	0.5
c. Nolled after jury disagreement	6	..	0.2
d. Nolled after plea guilty on other counts	6	..	0.2
e. Nolled after conviction on other counts	5	..	0.2
f. Nolled after transfer to Juvenile Court	21	..	0.8
g. Nolled because defendant already sentenced	84	..	3.3
h. Nolled on all counts, no reason assigned	399	..	15.8
Total	536	..	21.1

[1] This table is composed of figures from three different sources: item 2 is from the records of the Division of Police; items 3, 4, and 5 are from summaries of the figures of the execution docket of the Municipal Court from December 19, 1918, to December 31, 1919, and the remainder are from the survey statistics of the cases begun in 1919 in the Common Pleas Court. Since this court handles cases besides those from the Municipal Court, the totals, 2,901 ("bound over") and 3,236 ("no bill" plus "total disposed of"), are not identical. In Table 1, 4,499 is regarded as the base, and the proportions of various dispositions for all Common Pleas cases are assumed to apply to the 2,901 cases bound over. See Table 3 in the report on prosecution.

With all these avenues of escape open, it is not surprising that Cleveland has had extreme difficulty in punishing its criminals or in restraining crime by swift and certain justice. The business of justice is like a complicated game, the odds favoring him who has the intense desire to win plus the skill of an expert on his side. As between defendants, the advantage lies wholly with the habitual offender, who has played the game before and knows the expert to employ. The situation is portrayed in Diagram 2.

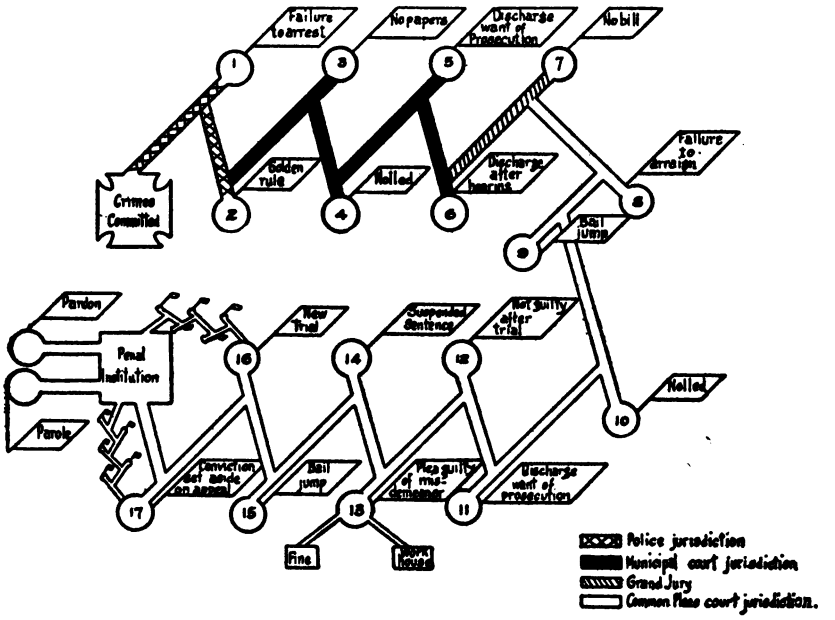


Diagram 2.—The path of justice

How the System is "Worked" for Weak Spots

The files of the Bureau of Criminal Identification of the Cleveland Division of Police contain the records of the most successful players of this game. Only a few examples can be given here because of lack of space. Most of the men are criminals by profession, though some are only occasional offenders. It is interesting to note by contrast the decisive results of Federal prosecution where the offender runs afoul of the Federal law. Unless noted otherwise, the place is Cleveland.

No. 10238

Year	*Charge*	*Disposition or explanation*
1911	Robbery	"Bench parole"
1911	Attempted burglary	Discharged in Municipal Court
1911	Violating parole	Turned over to Ohio State Reformatory
1914	Forgery	No bill
1915	Burglary and larceny	Plead guilty to petit larceny
1915	Suspicious person	Sentence, 30 days
1915	Assault to rob (two cases)	"Bench parole"
1916	Assault to rob	No bill
1916	Burglary	Not guilty
1916	Contempt of court	Discharged
1916	Intoxication	Suspended sentence
1916	Intoxication	Sentenced, $25 and 30 days
1916	Burglary and larceny	"Nolled"
1919	Burglary and larceny	Plead guilty to petit larceny
1919	Robbery	Not guilty
1919	Suspicious person	Discharged
1920	Burglary and larceny	Plead guilty to petit larceny
1921	Suspicious person	Sentenced to $25 fine

No. 12919[1]

1914	Assault to rob	"Nolled" in Common Pleas Court
1919	Receiving stolen property (automobile body)	Disagreement
1920	Suspicious person	"Nolled"
1920	Auto-stealing (five indictments)	Guilty; appeal; petition in error never entered; sentenced to Ohio State Reformatory
1921	Murder and robbery (while out on bail after conviction on fourth charge)	Sentenced to be electrocuted

No. 10480

1910	Assault and battery	Discharged
1911	Assault and battery	Suspended sentence
1911	Assault and battery	Discharged
1911	Assault and battery	Suspended sentence
1911	Indecent language	Discharged
1911	Assault and battery Violating sidewalk ordinance	Discharged
1911	Assault to kill (fractured victim's skull with iron bar)	Convicted of assault and battery
1911	Murder (assault)	Plead guilty to manslaughter. Sentence, one year
1917	Murder (shooting)	Convicted of manslaughter

No. 10482

1897	Grand larceny	Sentenced, $100 and 30 days for receiving stolen property
1906	Assault and battery	Discharged
1911	Violating Sunday law (saloon open)	Suspended sentence
1911	Assault and battery	Discharged

[1] Head of an organized band of auto thieves. See *Ohio Motorist*, February, 1921.

No. 10482—Continued

Year	*Charge*	*Disposition or explanation*
1911	Murder	Plead guilty to assault and battery; suspended sentence
1915	Carrying concealed weapons	Discharged
1916	Receiving stolen property (automobile)	Indicted November 14, 1916 "Nolled" April 10, 1919
1916	Receiving stolen property (automobile)	Indicted November 14, 1916 "Nolled" March 15, 1918

No. 7042[1]

1905	Grand larceny (30 pairs shoes)	Plead guilty to petit larceny
1910	Burglary and larceny	No bill
1913	Suspicious person	Discharged
1914	Suspicious person	"Nolled"
1914	Grand larceny (automobile)	Turned over to Geneva authorities
1915	Suspicious person (pocketpicking)	Discharged
1915	Suspicious person	Discharged
1916	Pocketpicking	Never arraigned
1917	Suspicious person	"Nolled"
1917	Rape (identified by victim)	Discharged in Municipal Court
1917	Suspicious person (pocketpicking)	"Nolled"
1918	Suspicious person	"Nolled"
1918	Violating auto law	Discharged in Municipal Court
1918	Grand larceny	Not arrested
1918	Robbery (wounded two policemen in escaping)	Not arrested
1918	Murder (killed policeman in escaping)	Not arrested
1919	Grand larceny (safe-blowing)	

No. 9407

1909	Burglary and larceny	
1909	Petit larceny	Sentence, $25 and 30 days
1910	Burglary	Houston, Texas; sentenced to $100 and three months
1910	Petit larceny	Suspended sentence
1910	Petit larceny	No papers
1911	Grand larceny	Toledo, O.; sentenced to Ohio State Reformatory
1913	Grand larceny	State of Washington; sentenced to penitentiary
1913	Grand larceny	Discharged in Municipal Court
1913	Grand larceny	Discharged in Municipal Court
1916	Forgery	Discharged in Municipal Court
1916	Petit larceny	Discharged
	Assault and battery	Discharged
	Disturbance	Discharged
1916	Housebreaking (two cases)	Discharged in Municipal Court
1916	Robbery	
1917	Robbery (three cases)	"Nolled" (because of Federal action), see below
1917	Robbery	
1917	Robbery (post-office)	Sentenced by Federal court, seven years in Atlanta Penitentiary

[1] Arrested in 1919 for the larceny, robbery, and murder of 1918 and the grand larceny of 1919; plead guilty to homicide on the murder; judge found second degree murder and sentenced him for life June 27, 1919. Other cases "nolled."

If we observe the operation of the system over a series of years, its weaknesses become clearer. Through the industry and courtesy of George Koestle, superintendent of the Bureau of Criminal Identification, of the Division of Police, the figures on the dispositions of felony cases for years 1914–1920 inclusive are available in Table 2. The arrangement has been changed somewhat, and a number of adjustments made with the approval of Mr. Koestle, but otherwise the basic figures given are exactly as compiled by the Bureau.

TABLE 2.—DISPOSITION OF FELONY CASES, 1914–1920, FROM THE RECORDS OF THE DIVISION OF POLICE

	1914	1915	1916	1917	1918	1919	1920
1. Total number felony arrests	1,705	2,157	2,749	3,611	3,561	3,460	3,788
2. Total accounted for by action other than that of Municipal or Common Pleas Court	82	278	344	441	494	625	822
3. Cases pending in Municipal Court	50	32	57	54	80	57	63
4. Cases disposed of by Municipal Court	1,573	1,847	2,348	3,116	2,987	2,778	2,903
a. Bound over to grand jury	1,263	1,491	1,916	2,443	2,432	2,120	2,235
b. "Nolle prossed"	122	125	173	263	227	210	294
c. Discharged in Municipal Court	186	231	259	410	328	448	374
5. Total cases, Common Pleas Court	1,398	1,794	1,963	2,829	2,636	3,325	2,891
a. Cases in which no true bill is found	279	338	501	623	768	745	617
b. "Nolle prossed"	154	268	260	494	395	662	933
c. Tried and acquitted	26	43	64	151	72	234	182
d. Number insane	..	..	..	2	1	4	1
e. Balance found guilty or plead guilty	939	1,145	1,138	1,559	1,400	1,680	1,158
I. Sentenced but paroled	240	272	283	340	233	216	81
II. Returned as parole violators	11	24	17	24	22	27	4
III. Sentence suspended	61	77	72	86	170	131	50
IV. Miscellaneous	..	..	2	14	6	14	20
V. Sentence carried out	627	772	764	1,101	969	1,292	1,003

Glancing at Table 2 makes it apparent that the "crime wave" has not been created wholly by a "yellow press." It must be noted also that this table includes only the serious criminal cases (felonies), so that the table would be unaffected by temporary strictness or relaxation in dealing with offenses usually the subject of reform, such as drunkenness, gambling, and prostitution. The population of Cleveland increased 42 per cent.

from 1910 to 1920, yet arrests for serious crime since 1914 only have increased 122 per cent., cases bound over 77 per cent., and the number of cases in the Common Pleas Court over 100 per cent. The number which were actually found or which pleaded guilty had increased 79 per cent. in 1919, but in 1920 dropped to 23 per cent., the lowest figure since 1916.

It happens that the period covered furnishes an opportunity to demonstrate the ability of the criminal lawyer to find the weak spots in the system. For some time before 1914, and for several years thereafter, Cleveland justice tended toward "sentimentalism," expressed by an excessive use of the "bench parole" (probation), more fully considered in a succeeding chapter. Shortly after the entry of this country into the World War the attitude of the public changed, and with the advent of the "crime wave" shifted to the opposite extreme. Judges responded by cutting bench paroles from 25 per cent. of the sentences in 1914 to 7 per cent. in 1920.

This gradual shutting off of the judicial "parole" forced the criminal lawyer to look elsewhere for relief. The principal sources of such relief were: (a) "nolles" in the Municipal Court; (b) discharges at the preliminary examination in the Municipal Court; (c) "no bills" by the grand jury; (d) "nolles" in the Common Pleas Court; (e) trial and acquittal by juries. A glance at the figures shows that all these sources have been called upon. Although the number of felony dispositions in the Municipal Court increased only 84 per cent. from 1914 to 1920, the number of "nolles" in that court increased 140 per cent. and the number of discharges 101 per cent. The number of dispositions in the Common Pleas Court increased 106 per cent. in the same period, but the number of "no bills" increased 121 per cent., the number of "nolles" 506 per cent., and the number of trials and acquittals 600 per cent. The increasing tendency to keep cases away from the discretion of the court is more marked in the Common Pleas Court than in the Municipal Court, probably because the lower court had already been "worked" almost to the saturation point.

Apparently there is a kind of Gresham's law in the administration of criminal justice. Just as cheaper currency tends to drive out dearer, so the slacker agencies tend to oust the stricter of jurisdiction. Diagrams 3 and 4 show plainly this tendency.

The increasing severity of the courts is shown in Diagram 3, which gives the change in the percentage ratio of sentences executed to all sentences. All cases which reached the judge for disposition, by *plea* or *conviction*, are included. The curve of all cases sentenced, based on a percentage of all the cases disposed of by the court, shows the increasing tendency to *keep cases away from the judge*, chiefly by "nolling," trial and acquittal, and "no bill."

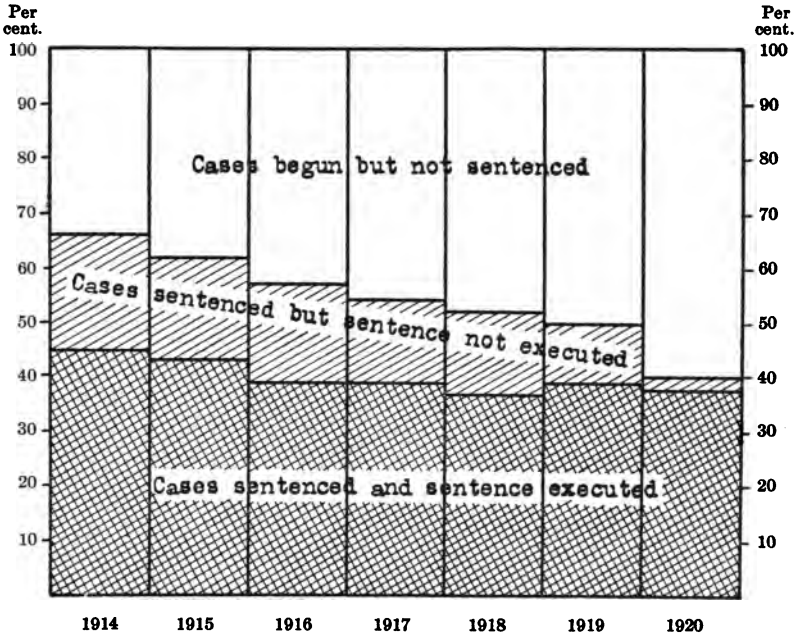


Diagram 3.—Comparison of severity in sentencing with decreasing tendency to bring cases to sentence. (Common Pleas Court, 1914–20)

Diagram 4 shows the same tendency in more specific form, the percentage of "bench paroles" of cases sentenced being compared with the

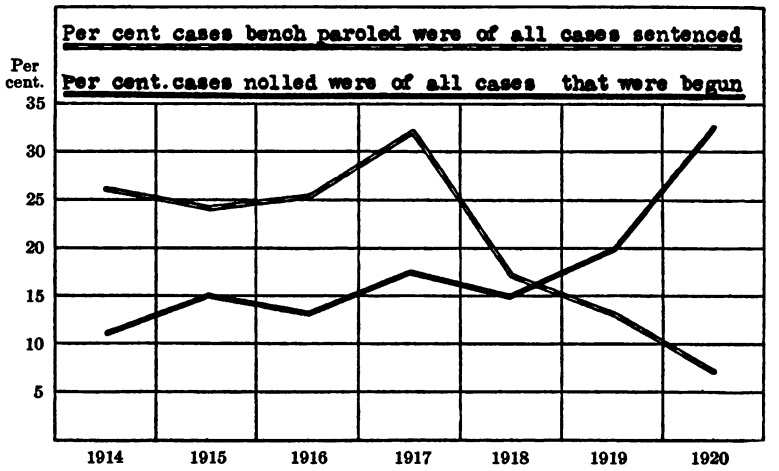


Diagram 4.—Comparison of decline of "bench paroling" with increase of allowing "*nolle prosequi*"

percentage of cases "nolled" of all cases disposed of. The reciprocal action is clear.

How the system is "worked" for weak spots may also be seen in Tables 3 and 4 by comparing the dispositions and suspended sentences of Common Pleas cases obtained under the guidance of the most sophisticated criminal lawyers, with the results in other cases. For the purposes of these tables, criminal lawyers with political affiliations were chosen. A list of all lawyers having more than 10 cases each begun in 1919 was sent to a Cleveland lawyer thoroughly familiar with the local bar. This lawyer, without knowing the figures for any names in the list, marked the attorneys with political leanings and his judgment was accepted. The figures are not as significant as a selected list would show because the names chosen for political affiliations include several high-minded men who are not primarily criminal lawyers at all. The comparison does not necessarily throw discredit upon the lawyers selected: it does reveal a system which lends itself to manipulation. It is to be regretted that the absence of proper records prevents a similar comparison being made for the earlier stages of the cases in the Municipal Court.

TABLE 3.—DISPOSITIONS OF CASES OF 27 POLITICAL LAWYERS[1] COMPARED WITH DISPOSITIONS OF ALL OTHER CASES BEGUN IN 1919 IN THE COMMON PLEAS COURT

	Number of cases of 27 political criminal lawyers	Number of all other cases	Per cent. of cases of 27 political criminal lawyers	Per cent. of all other cases
Total cases	412	2,127	100.0	100.0
Total pleas of guilty	147	1,068	35.7	50.2
Original pleas of guilty	10	418	2.4	19.7
Original pleas of not guilty changed to plea of guilty	101	449	24.5	21.1
Original pleas of not guilty changed to plea guilty of misdemeanor	33	160	8.0	7.5
Other pleas	3	41	0.7	1.9
Total disposed of by trial	127	463	30.8	21.9
Guilty of felony after trial	60	233	14.6	11.0
Guilty of misdemeanor after trial	17	57	4.1	2.7
Not guilty of felony after trial	50	165	12.1	7.8
Not guilty of misdemeanor after trial	..	8	..	0.4
"Nolled" on all counts	104	295	25.2	13.9
All other dispositions	34	301	8.3	14.2

[1] Having more than 10 cases each among all cases begun in 1919 in the Common Pleas Court.

The sagacity of the criminal lawyers may be seen in the fact that they allowed scarcely more than a third of their clients to plead guilty as compared with more than half of the others; that of those who did plead guilty, proportionately only one-sixth as many pleaded guilty upon arraignment as compared with the others, showing a tendency on the part of the criminal lawyers not to surrender until they had made a deal with the prosecuting attorney, or until it was clear their cases were hopeless; that of those who pleaded guilty the proportion who were allowed to plead guilty to a lesser offense was half again as great as in the other cases. Most striking is the proportion of nearly twice as many cases "nolled" by the prosecuting attorney, and 50 per cent. more cases tried by jury.

Even during a period in which judges were stiffening in the matter of "bench paroles" and suspended sentences, the political criminal lawyer has been able to snatch some advantage for his clients, although the courts have not yielded in this respect as much as other agencies. Of those who were sentenced, proportionately 20 per cent. more secured suspended sentences when represented by these lawyers than when represented by the bar at large.

TABLE 4.—SENTENCES AND SUSPENSION OF SENTENCES OF THE CASES OF 27 POLITICAL LAWYERS[1] COMPARED WITH THE SENTENCES AND SUSPENSION OF SENTENCES OF ALL OTHER CASES BEGUN IN 1919

	27 political criminal lawyers	All other cases	Per cent. of cases 27 lawyers	Per cent. of other cases
Total cases	412	2,127	100.0	100.0
No sentence indicated	182	755	44.2	35.5
Total sentenced	230	1,372	55.8	64.5
Total sentence suspended	58	293	14.1	13.8
Total sentence executed	172	1,079	41.7	50.7
Total sentenced for felony	124	780	30.1	36.7
Total sentence felony suspended	38	203	9.2	9.5
Total sentence felony executed	86	577	20.9	27.1
Total sentence misdemeanors	106	592	25.7	27.8
Total sentence misdemeanors suspended	20	90	4.9	4.2
Total sentence misdemeanors executed	86	502	20.9	23.6
Total misdemeanors sentenced to fine only	40	257	9.7	12.1

[1] Having more than 10 cases each among all cases begun in 1919 in the Common Pleas Court.

What Steps may be Eliminated

We have now seen enough of the system in operation to understand the fundamental difficulty, leaving to one side questions of personnel. The steps in the administration of justice are too numerous, involve too many agencies, and are too loosely guarded. It is the old difficulty of weak links in a chain. All unnecessary links should be eliminated, and those remaining should be made as strong as possible.

Those steps which may be eliminated to advantage are probably already obvious. The study of the county prosecutor's office brings out the folly of expecting efficient handling by the prosecuting attorney of cases which were dealt with in their vital stages, without his knowledge or attention, first by the police, and then by the police prosecutor.[1] The futility of entrusting the power to "nolle" to two sets of prosecutors is equally clear. Three different judicial agencies are asked to discharge the defendant because there is no *prima facie* case against him—the Municipal Court at the preliminary examination, the grand jury on presentment by the prosecutor, and the Common Pleas Court on motion to discharge or for a directed verdict.

The hardship on the State's witnesses in attending this multiplicity of hearings and continuances needs no comment, nor the fact that the State loses valuable testimony by this process of attrition. We have already seen that, of cases beginning in the Municipal Court, approximately 42 per cent. die in that court and the grand jury room, but it is not possible to tell how many other cases which survive these stages finally perish for lack of evidence which was available at the earlier stages. The average time from indictment to disposition of all Common Pleas felony cases begun in 1919—originating in the Municipal Court—was 46.3 days, but the average time from arrest to disposition was 67.8 days. This entire excess of 21.5 days per case is unnecessary and injurious. Also, as will be seen later, the dragging out of cases is largely responsible for bail bond trouble, since a speedy trial would often do away with the necessity of bail. It is, moreover, an injustice to a defendant to put him in a position where he may be called upon to furnish at least three bonds—first after arrest, then after being bound over, and finally after indictment.

A glance at Diagram 2 will show that all the steps in the Municipal Court, together with the grand jury, may be dropped to advantage. It should be enough if a judge finds there is probable cause to hold a defendant for trial, and the judge might better be a Common Pleas judge

[1] See report on prosecutor's office.

than a Municipal Court judge. The grand jury proceeding might be retained for special investigation only.

The trinitarian aspect of felony jurisdiction is the product of historical causes only. In feudal England, when the Common Law system was beginning, the king sent his judges on tour throughout the realm, so that the court sat for a certain time only in each county. It became necessary for local magistrates to examine and hold suspected felons in the interim, and for a grand jury of neighbors to meet occasionally to examine into all crimes committed in the county as preparation for the coming of the court. This custom was carried into pioneer America.[1] The function of holding suspected felons, admitting them to bail, and recognizing witnesses was conferred on justices of the peace.[2] In 1852 this *ad interim* jurisdiction was conferred upon the police court of Cleveland, and this was continued in the Municipal Court Act of 1910. Today, however, the Common Pleas Court is permanently resident in Cleveland, and sits, or can sit, continuously throughout the year. Full exclusive felony jurisdiction could be conferred upon this court without any practical difficulty or injustice.

It may be queried whether there is any reason for continuing jurisdiction over misdemeanors in the Municipal Court. After consideration of the Municipal Court's work in this respect,[3] it is recommended that this jurisdiction also be conferred on the Common Pleas Court. Again the reason for the separate jurisdiction is historical, due to the necessity of disposing of minor causes promptly, without waiting for the "terms" of the higher court. The Municipal Court inherits through the police court and justices of the peace.[4] It is not true that petty criminal causes may safely be entrusted to judges of inferior quality. Such cases may not require a high order of legal ability;[5] they emphatically need men of high character on the bench; for no other court comes so close to the lives of the mass of the people, or has a greater opportunity to inculcate respect for our institutions.

There are no legal difficulties in the way of transferring full criminal

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[1] See Act of 1790, providing for government of the Northwest Territory, increasing the "terms" of the Common Pleas Court. See also Ohio Constitution, 1802, Article III, dividing the State into "circuits."

[2] See Act of 1804, specifically conferring this power on justices of the peace.

[3] See Chapter V.

[4] Misdemeanor jurisdiction also exists in the Probate Court, but this was at one time eliminated from Cuyahoga County in 50 O. L. 84 (1852). See Sec. 13424.

[5] This is generally true of all criminal cases.

jurisdiction in all causes to the Common Pleas Court. The constitution provides simply that the jurisdiction of this court shall be fixed by law.[1] All that is necessary is an appropriate statute.

There may be more difficulty with respect to abolishing the grand jury and substituting therefor, if necessary, the prompt and compulsory information of the prosecuting attorney. Article I, Sec. 10, of the Ohio constitution provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury." A similar provision has been strictly construed.[2] An amendment to the constitution of Ohio would be necessary to administer justice in metropolitan communities without the compulsory use of a grand jury. Such a result, however, would be well worth the effort. There is no difficulty with respect to the Federal constitution.[3]

Results of Unified Court in Detroit

It may be said by the cynical that the organic changes suggested will do no good because the trouble is with "human nature." This sort of reasoning would never have advanced civilization beyond the stage of private vengeance and the blood feud. "Human nature," meaning thereby its least admirable traits, is effective only so far as opportunity and reward exist for wrongful effort. Reduce these, and improvement invariably results. Tangible evidence of this truth is seen in the recent history of Detroit. Before April, 1920, Detroit criminal justice was administered much as in Cleveland—by two sets of courts, with much duplication of judicial machinery. In April, 1920, the entire criminal jurisdiction of the city was vested in one court, which constitutes a unified tribunal with plenary jurisdiction over all offenses—ordinance violations, misdemeanors, and felonies. The result may be seen in Table 5.

These figures become more impressive in the light of the "crime wave" in other cities. Credit for the betterment undoubtedly belongs largely to an increase in the police force and better methods of administering that department. Nevertheless, the Detroit police department, in its bulletin for March, 1921, makes the following significant acknowledgment:

"Any statement of the improved crime condition of the city of Detroit should take into account the work of the Municipal Court."

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[1] Article IV, Sec. 4.

[2] Lougee v. State, 11 Ohio, 68.

[3] See Hurtado v. People, 110 U. S., 516. Michigan never had a provision guaranteeing grand jury procedure.

TABLE 5.—THE DETROIT COURT; POLICE RECORD OF FOUR MAJOR CRIMES OF PROFESSIONAL NATURE

	1921	Average preceding five years	1920	1919	1918	1917	1916
BREAKING AND ENTERING DWELLINGS:							
January	38	126	64	131	143	95	199
February	42	110	78	130	155	77	109
BREAKING AND ENTERING BUSINESS PLACES:							
January	35	122	99	114	162	124	110
February	46	107	99	81	173	96	83
ROBBERY:							
January	53	77	112	62	83	85	45
February	35	66	98	53	99	50	30
LARCENY FROM PERSON:							
January	37	52	46	59	51	44	58
February	19	51	39	42	45	77	53

Table 5 deals with four selected crimes for two months. The direct influence of the new unified court on the crime situation may be seen in Table 6, based on the record of all crimes for twelve months.

The increased number of misdemeanor complaints, arrests, and police

TABLE 6.—RESULTS OF UNIFIED CRIMINAL COURT IN DETROIT

	For the year ending April, 1920	April, 1921
FELONIES:		
Complaints	13,195	13,795
Arrests	7,491	11,115
Disposed of by police	4,383	7,246
Disposed of by court	3,108	3,869
Convicted by court	1,664, or 51 per cent.	2,648, or 70 per cent.[1]
MISDEMEANORS:		
Complaints	37,929	40,858
Arrests	32,415	35,315
Disposed of by police	13,394	19,465
Disposed of by court	19,021	15,850
Convicted by court	16,410, or 86 per cent.	14,222, or 90 per cent.

[1] These figures may be profitably compared with 4,262 felony cases disposed of by judicial process in Cuyahoga County in 1919, of which 37.1 per cent. were convicted on plea or after trial.

dispositions is explained by the increased activity of the department in handling gambling and other minor offenses.

A description of the operation of the unified criminal court is contained in the *Journal of the American Judicature Society*, April, 1921, and August, 1920 (Vol. IV, Nos. 6 and 2), and in the *Journal of Criminal Law and Criminology*, November, 1920 (Vol. XI, No. 3). The changes effected by the establishment of this court in making justice swifter and more certain are worth careful study.

CHAPTER IV

THE BENCH AND ITS BACKGROUND

Importance of the Bench

THE administration of justice is not a purely mechanical process. Its satisfactory conduct depends more than any industry on the human factor, because the administration of justice deals with the evaluation of human souls, and not with commodities or operations capable of measurement. Among these human factors the judges hold the place of unique responsibility. Their attitude at the trial often determines the result. They have it in their power to suspend sentences, to grant new trials, to eliminate delay, to reduce perjury, to assure better selection of jurors, and, theoretically at least, to pass on motions to "nolle" cases before them. It is obvious that strong judges, capable of inspiring respect and unafraid, may save even an archaic system from absolute failure.[1] No system of administering justice can rise higher than the quality of its bench, although it may go much lower. In order to understand the Cleveland situation, therefore, it is a necessary preliminary to understand the bench and the influences to which it may be subject.

Personnel

Thumb-nail sketches are rarely likenesses and serve no good purpose if used merely to tag the individual subjects. As a group, however, such sketches may be useful in conveying a composite impression of the bench of Cleveland. The summaries given coincide with the common view of many members of the bar who otherwise differ widely in political and social outlook. The unanimity of opinion was surprising.

It should be remembered, however, that the bench as a whole is rated much lower than the individuals composing it. The picture of the judges would not be complete without the cheap, tawdry background which robs the subjects of their dignity and subdues the individual's good points. It is with the nature of this background that this chapter is chiefly concerned.

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[1] This is true to some extent in Massachusetts.

The Common Pleas bench, as it was in April, 1921, is commonly characterized as follows:

In respect of legal ability it consists of two judges who, by reason of long experience on the bench, have acquired a wide knowledge of the law and practice; five judges of fair native ability, some of whom need experience to become good judges; two judges of mediocre ability; one judge not tried out sufficiently to afford a basis for judging legal qualifications; one judge of practically no juristic qualifications, and one whose unusual legal gifts make his presence on the bench a decided asset. In respect of faithfulness to duties, the list includes one judge who is notoriously unpunctual, several others designated as somewhat "lazy," and one who is occasionally guilty of gross neglect of his duties. Two judges possess considerable dignity of character, but others are characterized as "playing politics," "weak before popular clamor," "publicity getters," etc. One judge is remarkable for social-mindedness, which makes him fertile in constructive ideas, but sentimental in dealing with criminals. The personal habits of all but one of the judges seem to be above serious criticism.

As a group, the Common Pleas bench would probably compare favorably with county courts in other metropolitan jurisdictions. Criticism largely centers on its want of fine traditions,[1] absence of dignity, and lack of independence in thought and action. These qualities will be considered later.

The Municipal Court bench is characterized as follows:

In respect of legal ability the court contains four judges who might be said to measure up to the requirements of the office—one by reason of long experience on the bench; another because of previous experience as a justice of the peace; a third for his long experience at the bar and his previous official connection with the court; and a fourth by reason of

[1] A bench with high traditions would probably not have instituted, or at least not approved of the conduct of, the suit of State ex rel. Powell v. Zangerle, a petition in mandamus brought by the judges to compel the payment of increased salaries to themselves, as voted by the legislature. The constitutional question involved in the increase of salaries during term of office was a delicate one, yet in this suit a favorable decision by a judge of the same court in another county was accepted as final. The counsel for the judges drew the demurrer for the defendant, and no appeal was taken from the decision. Grave doubt has subsequently been thrown on this decision by the State ex rel. Metcalfe v. Donahey, a Supreme Court opinion holding that the increase may not be paid to Court of Appeals judges during the same term of office. It is irrelevant that the judges ought to be paid larger salaries. Most detrimental to the dignity of the bench was the patronizing attitude of the bar that it was glad to see the judges get more money, constitutionally or not.

years of private practice in a representative Cleveland firm. Two of the others are credited with fair ability, three are mediocre, and one apparently has no qualifications worth mentioning. The list includes two judges characterized as "playing politics," and two others designated as "gallery players."

On the whole, the personnel of the municipal bench is inferior in quality and ineffectual in character. A close observer of the Cleveland courts for years states that the present Municipal Court judges are not much superior to the old justices of the peace, and that whatever increased dignity they appear to possess arises entirely from the improved physical setting.

It is the almost universal belief among men whose opinion may be valued that the Municipal Court judges are irreproachable in respect of being influenced by money considerations. The survey did not attempt to follow up such vague and isolated charges as were brought to its attention, for two reasons: In the first place, actual corruption is impossible to prove without the power to compel testimony. Moreover, it is not indicative of the real trouble, since an occasional dishonest judge cannot make a venal bench, nor is an incorruptible bench enough to assure a proper administration of justice.

Recent Changes in the Election Laws

In considering the present personnel of the bench, especially in the Common Pleas Court, a brief summary of recent changes in the mode of nominating and electing judges becomes important.

For many years prior to 1908 there had been little change in the law pertaining to nomination and election of judges. 88 Ohio Laws 455, Sec. 12 (1891), had provided two methods of nomination—first, by caucus or convention, primary election, or certification of the executive committee of an established political party, and second, by petition signed by a certain number or percentage of the voters. In 97 O. L. 226 (1904) a change in detail was made in the provision as to nomination by petition. The prevailing method of nomination was by party convention, the petition method being rarely used.

99 O. L. 217, Sec. 12 (1908), provided for nomination by direct vote unless the county controlling committee desired a nominating convention, in which case the delegates were to be elected at the primary. Nomination by petition was not disturbed. As a matter of fact, nomination by convention still persisted, and nomination by petition remained the unsuccessful recourse of the "independents."

Until 1911 election of judges was by party ballot, but 102 O. L. 5, Sec.

2, known as the "Non-Partisan Judiciary Act," provided that there should be no designation as to party upon the election ballot. This provision is in effect today.

In 1912 the new constitution provided in Article V, Sec. 7, that all nominations "shall be by direct primary elections or petition as provided by law."

In 1913 the "Direct Primary Law" was passed (103 O. L. 476), wiping out the nominating convention, and providing for nomination by direct primary, nomination papers to be signed by 2 per cent. of the voters. 106 O. L. 542 (1914) eliminated the necessity of having voters sign such nomination papers for the primaries, and this constitutes the law today (General Code, Sec. 4969). Nomination by petition outside of the primary is retained (G. C., Sec. 4999), and is now used to a considerable extent.

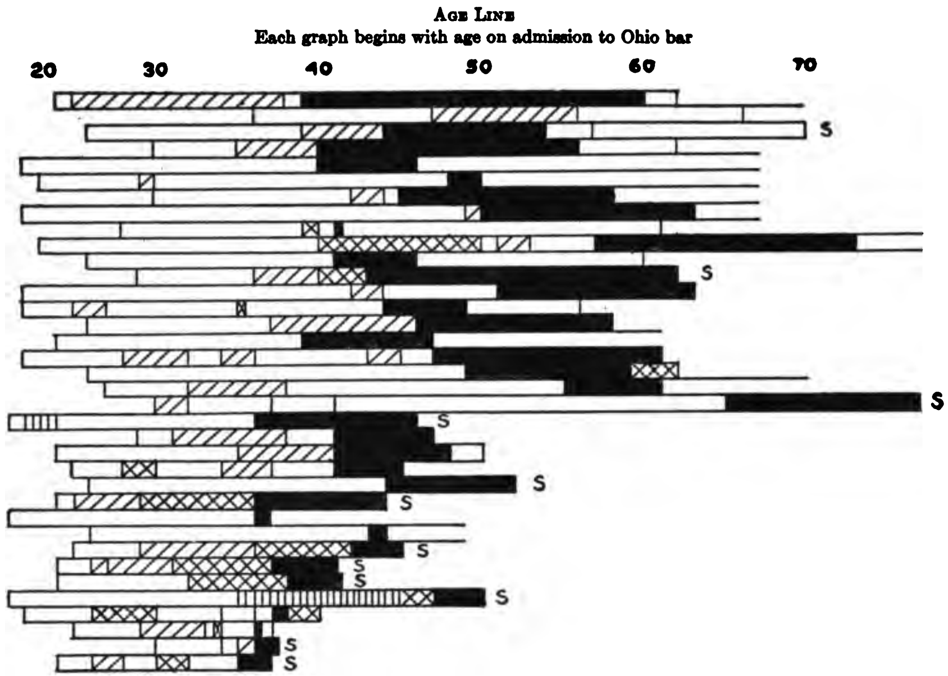
If it is possible to draw any comparisons between judges of the Common Pleas bench produced under the older system and newer modes of selection, it is suggested that the line be drawn between the election of 1910 and that of 1912. The former election may be said to mark the end of the period of partisan judiciary and convention nomination, and the latter to begin the present era of wide-open elections and direct nominations.

The Municipal Court had its beginning at the time of experimentation with nominating and election machinery. 101 O. L. 364 (1910) provided for nomination by direct vote, following the form of 99 O. L. 217, Sec. 12, for other judges and for election in the same manner as provided for other municipal officers. 102 O. L. 155, Sec. 5 (1911), is similar as to nomination, but the provision as to election is eliminated, probably to bring the judges under the general law for the election of judicial officers passed the same year, 102 O. L. 5, Sec. 1–6. In 1914, 106 O. L. 274 (now G. C., 1579–5), provided that judges of the Municipal Court should be nominated as other municipal officers,—by petition only, Cleveland Charter, Sec. 3, 1913,—and elected as other judicial officers, in non-partisan election. Practically, the existence of the Municipal Court has been entirely in the period of direct primary and non-partisan elections.

Apparent Effects of These Changes

For the purpose of summarizing recent history of the personnel of the bench, two diagrams are printed. Diagram 5 shows Common Pleas judges who have served from 1900 to the present date, with political affiliation, mode of first coming to the bench, date of election or appointment, age on admission to the bar, and subsequent legal experience.

Judges — Name	Politics	Date first elected or appointed
Stone	Rep. Elec.	1885
Dissett	Rep. Elec.	1894
Neff	Rep. Elec.	1895
Strimple	Rep. Elec.	1896
Dellenbaugh	Rep. App't	1895
Wing	Rep. App't	1899
Ford	Rep. Elec.	1899
Babcock	Dem. Elec.	1901
Shallenberger	Rep. App't	1901
Phillips, G. L.	Rep. App't	1901
Tilden	Dem. Elec.	1902
Kennedy	Rep. Elec.	1902
Lawrence	Dem. Elec.	1902
Schwan	Rep. Elec.	1904
Keeler	Rep. Elec.	1904
Chapman	Rep. Elec.	1904
Estep	Dem. Elec.	1906
Vickery	Rep. Elec.	1908
Collister	Rep. Elec.	1908
Foran	Dem. Elec.	1910
Pearson	Dem. Elec.	1912
Gott	Dem. App't	1912
Stevens	Dem. Elec.	1912
Lieghley	Dem. App't	1913
Powell	Rep. Elec.	1914
Levine	Dem. Elec.	1914
Friebolin	Dem. App't	1914
Morgan	Dem. App't	1917
Baer	Dem. Elec.	1918
Cull	Dem. Elec.	1918
Kramer	Rep. Elec.	1918
Phillips, F. C.	Rep. Elec.	1918
Terrell	Dem. Elec.	1918
Day	Dem. App't	1920
Allen	Dem. Elec.	1920
Bernon	Dem. App't	1920



S Indicates still serving

Opportunity for private law practice

Common Pleas bench

Public offices which exclude opportunity for private practice:

- Office of public attorney (police prosecutor, city solicitor, prosecuting attorney, assistant prosecuting attorney, law director)
- Judicial office other than Common Pleas (police judge, municipal judge, Common Pleas elsewhere, justice of peace)
- Clerical office (bailiff, clerk)

Diagram 5.—The legal career of judges of the Common Pleas Court, 1885 to the present, with respect to their ages and their public and private services

Diagram 6 shows the same facts for the Municipal Court judges since the organization of that court. Many of the judges set down as appointed were subsequently elected.[1]

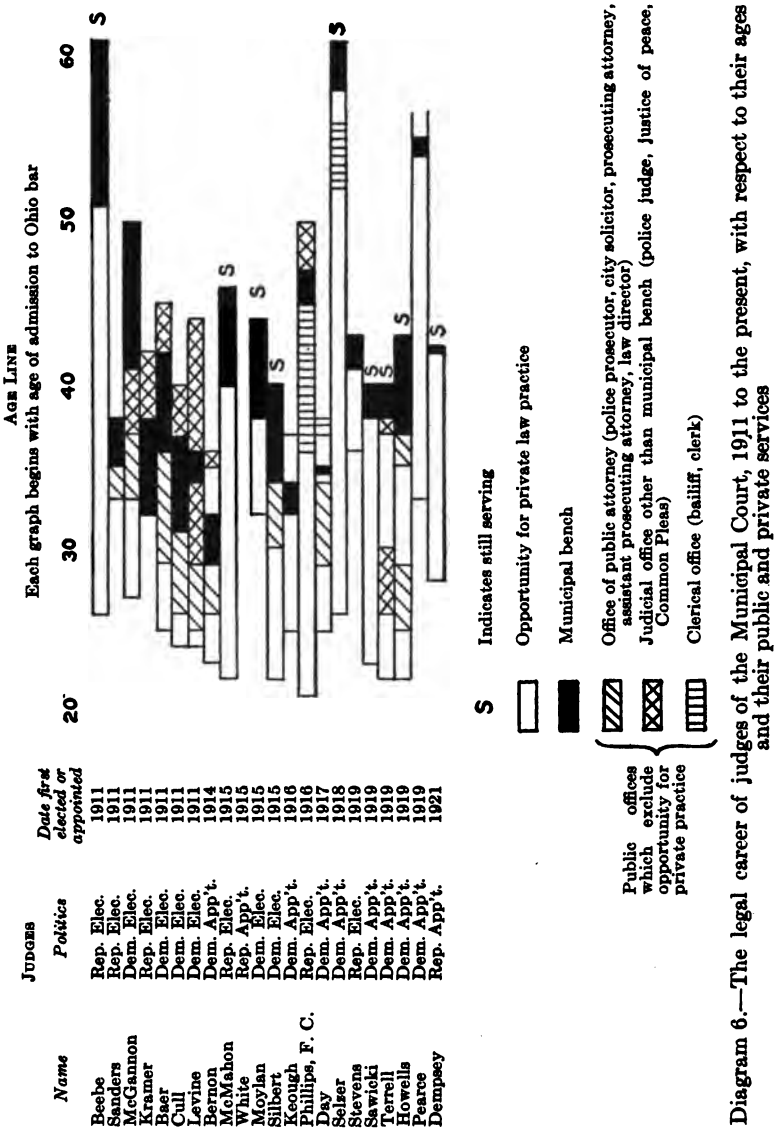


Diagram 6.—The legal career of judges of the Municipal Court, 1911 to the present, with respect to their ages and their public and private services

[1] The charts may not be precise in every detail, but should be sufficiently accurate for general deductions.

Turning to Diagram 5, it is at once apparent that with the election of 1912 a much younger group of men began to appear on the bench. A ruler laid across the chart along the line of 40 years of age shows only two judges beginning their service under that age before 1912, and eight judges after 1912. Similarly a line drawn across 45 years of age shows only nine out of 20 before 1912 and 15 out of 16 after that date. A comparison is given in Table 7.

TABLE 7.—AGE ON ELECTION OR APPOINTMENT, COMMON PLEAS COURT

Age	Judges on bench, 1900–1910	New judges, 1912–1921
35–39	2	9
40–44	7	6
45–49	5	1
50–54	2	0
55–59	3	0
60–64	0	0
65–70	1	0

Another noticeable difference is the quality of the experience brought to the bench by the judges before 1912 compared with the later group. The shaded areas in Diagram 5 represent experience which necessarily or largely excluded private practice, and conversely, the white areas represent opportunity for such practice. Table 8 summarizes the

TABLE 8.—OPPORTUNITY FOR PRIVATE PRACTICE, COMMON PLEAS COURT

Years of opportunity for private practice	Judges on bench, 1900–1910	New judges, 1912–1921
0–4	1	3
5–9	3	5
10–14	5	4
15–19	4	4
20–24	4	0
25–29	2	0
30–34	1	0

amount of opportunity for private practice. Before 1912 most of the judges were apparently well seasoned in the private practice of the law, whereas after that date the majority had been trained chiefly in the office of inferior judge or prosecutor. Since the difficulties of trial and

consequences of decisions and rulings can be best appreciated by the man who has "been through the mill," it is not surprising that the Cleveland bar displays no little impatience toward the bench. Table 9 indicates the comparative inexperience of the newer judges.

TABLE 9.—TOTAL YEARS OF EXPERIENCE, COMMON PLEAS COURT

Years	Judges on bench, 1900–1910	New judges, 1912–1921
0–4	0	0
5–9	0	1
10–14	3	6
15–19	7	8
20–24	2	0
25–29	3	1
30–34	1	0
35–40	1	0

The Municipal Court has been in existence for nine years only, under practically one method of selecting its judges, so that Diagram 6 does not contain much material upon which conclusions may be based. Many members of the bar, however, are of the opinion that there has been progressive deterioration in the quality of judges first reaching that bench by the election method.

The present personnel of the Common Pleas bench includes seven Democrats and five Republicans; the Municipal Court, six Democrats and four Republicans. Since Diagrams 5 and 6 contain only the dates of *first* elections and appointments, they are not well adapted for judging whether a non-partisan bench has been secured. Since 1911 the elections of judges have resulted as follows:

Municipal Court			Common Pleas Court		
Date	Parties	Mayoralty	Date	Parties	Governor
1911	4 Dem., 3 Rep.	Democrat	1912	5 Dem., 0 Rep.	Democrat
1913	1 Dem., 2 Rep.	Democrat	1914	2 Dem., 4 Rep.	Republican
1915	5 Dem., 2 Rep.	Republican	1916	2 Dem., 1 Rep.	Democrat
1917	2 Dem., 2 Rep.	Republican	1918	4 Dem., 2 Rep.	Democrat
1919	6 Dem., 1 Rep.	Republican	1920	4 Dem., 2 Rep.	Republican

The Municipal Court has probably been a true non-partisan institution from the beginning. The predominance of Democrats elected to this

bench is due somewhat to the vacancies which occurred during Governor Cox's two terms as governor. There were nine vacancies before 1921, eight of which were filled by Governor Cox with Democrats, some of whom replaced several Republicans. The strong tendency on the part of the voters to reëlect men already on the Municipal bench secured the election for most of these appointees.

Elections to the Common Pleas bench have shown a growing tendency to become non-partisan, despite the fact that there is now somewhat of a reaction toward party sponsorship.[1]

The Underlying Cause for Dissatisfaction

The changes in election machinery were in large part the result of the progressive wave which swept the country in the first decade of the century.[2] They represent a revulsion against intolerable political conditions then flourishing,[3] and it was impossible to foresee all the effects of the steps when proposed by the new leadership. Cleveland has now had ten years' experience of the wide-open method of selection, and although few would care to return to the bossed party conventions, it is safe to say there is scarcely a man in Cleveland able to weigh the qualifications for the bench who does not deplore present tendencies and fear them.

It is not altogether a question of comparing the intrinsic ability and integrity of the new judges with the old. Such a comparison might not be wholly unfavorable to some of the younger judges. Nor does the reason lie entirely in the fact that the judges are coming to the bench younger and less experienced than formerly, and that a few are markedly unsuited for judicial careers. These are symptomatic conditions only. Most serious is the present cheapening of the judicial office, so that neither the bar, the press, nor the judicial incumbents themselves any longer respect it. Young lawyers who would have viewed the bench

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[1] See issue of the Cleveland *Press*, October 30, 1920, for an advertisement by the Republican Executive Committee consisting of a "slate" of judges captioned "Republican Judicial Candidates." The *Press* has been one of the foremost proponents of the non-partisan election of judges.

[2] See Mr. Tannehill's appeal to the progressive and Roosevelt vote in introducing the direct primary amendment at the Constitutional Convention, Ohio C. C., 1912, Proceedings and Debates, p. 1239.

[3] "The chief cause of the frequent failure of representative government lies in the corrupt, boss-controlled, drunken, debauched, and often hysterical nominating convention," says the sponsor for the direct primary provision, *ibid.*, p. 1239.

with reverence formerly, now give voice to their disrespect, and retired and even sitting judges are openly cynical.

The situation is summed up in the universal comment that the judges are generally above the suspicion of taking direct money bribes, but find it difficult to forget the coming election.[1] To judges who have had little or no private practice before beginning their public careers, the matter of insuring reëlection is especially urgent.

Here again the trouble lies in attempting to adapt the democracy of the town meeting to a great cosmopolitan population. Direct nomination and non-partisan election of judges produce fairly satisfactory results in a small community, where everyone knows the nominees, and fitness for office is a matter of common appraisal. Judges from country districts are frequently sent to the Cuyahoga Common Pleas Court to help handle the crowded docket in that court, and Cleveland lawyers, on the whole, prefer these outside judges to the members of the local bench. Superior legal ability generally and greater disinterestedness are conceded to these country judges. In a community of nearly a million population, however, containing many voters who cannot even read English, it is not possible for more than a small proportion of the voters to know anything about the fitness for office of the numerous candidates for judicial office. This small group could carry the city by aggressive leadership,[2] but so far there has been no such leadership. The result has been that a judge facing reëlection has had to insure his survival through one or several of the following ways: catering to petty bosses who control votes; patronizing certain influential groups—racial, religious, or industrial; general publicity in the newspapers or otherwise. Whichever way the premium is paid, the judge and his high office are degraded.

In considering the effects of these influences, the words of judges and prominent lawyers are freely quoted in this report in order to convey as much as possible of the local feeling. Even if some of the statements seem extreme, it should be remembered that the fact responsible men speak in this way of the bench is itself a factor of importance. The observations proceed from men full of reverence for the bench as an institution and a desire to see it restored to its historic dignity.

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[1] This difficulty is not experienced by judges alone. The County Treasurer's office is placarded with this amusing apology: "The County Treasurer is not responsible for the increase in your taxes. The increase was carried by vote of the people at the last election."

[2] The recent victory of the Coalition Judicial ticket in Chicago is an example.

Importance of the Petty Politician

Catering to politicians is probably the least common mode of assuring reëlection for Common Pleas judges, and not the most desirable for the Municipal judges. It is not only distasteful, but dangerous. Undoubtedly, under the older methods of selection, there were forces which impelled a judge to heed the wishes of the great chieftains of the party, but it must have been less subversive of morale to deal with chiefs, who interfered rarely, than to listen continually to the unvoiced threats of petty vote controllers specializing in criminal law. When one considers that most professional or habitual criminals engage these political lawyers to defend them, the unwholesomeness of the condition is clear.

Moreover, it is often difficult to say where influence ends and "good-fellowism" begins.[1] Both judges and prosecutors have often risen through politics, and it would not be surprising to find that they have not forgotten some of their old associates. The effectiveness of the political criminal lawyer has already been discussed[2] in a general consideration of the system, and reference may be had to Tables 3 and 4.

No statistics on this subject can be secured for the Municipal Court, but prevalent opinion is that "influence" and "good fellowism" flourish still more successfully in that court. This is to be expected where great haste and inadequate record keeping afford a screen behind which operations may be conducted.[3] It is not uncommon for lawyers to call judges on the telephone to talk about their cases. Usually publicity at the trial will thwart any tendency to favoritism by the court. In one

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[1] Even in civil cases, where the alertness of opposing counsel minimizes the danger of favoritism, complaints are not uncommon. "Before some of the judges," remarks one lawyer, "my first worry is to wonder what 'drag' opposing counsel has with the court."

[2] See Chapter III.

[3] An ex-Municipal Court judge states that when asked to defend his former office boy, he advised him to see the "boss" of his ward and not to waste time with a mere lawyer. An attorney relates that a professional criminal asked him to secure a continuance until he could get his councilman. The papers in this case were subsequently withdrawn. One of the leading firms in the city advised a client in an automobile manslaughter case to take his medicine "because the evidence against him was conclusive." The defendant retained a councilman-lawyer, however, and after several continuances was discharged.

Care should be taken not to make a blanket charge that all judges cater to politicians. Specific instances could be cited where judges have courageously stood out against politics in their court.

case on a charge of rape the defendant, a politician of low order, had a reputation for slipping out of "scrapes" through influence. On the day of the preliminary hearing the court-room was filled with representatives of various women's societies, and the man was bound over. The ways of "influence" are so devious, however, that not even full publicity will avail where there is a determination to protect. "Tim" Raleigh openly and decently maintained an establishment for the placing of election, baseball, and racing bets. It was operated, as a Common Pleas judge had expressed it, "not with the connivance, but with the acquiescence, of everyone," and apparently was regarded as a public service institution. Owing to the vigorous attacks of the Cleveland *Press*, arrests were made and a trial forced. It is reasonable to suppose that no one in authority sincerely desired to convict Raleigh, who had obtained tacit, if not express, consent to the conduct of his business. The *Press* had tried Raleigh in its columns and convicted him, even to the extent of publishing names of men who had placed bets. Nevertheless Raleigh was acquitted, under such circumstances that the judge, jury, prosecutor, and police could each lay reasonable claim to having acted conscientiously and yet point the finger of suspicion at the other.[1]

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[1] Warrants against Raleigh were sworn on November 11, 1920, on which date Raleigh was arraigned and pleaded not guilty. The case was continued to November 24, then to December 8, then to December 16, when a jury was demanded. The case was then continued to February 7, 1921, and then to March 7.

There were two charges against Raleigh, one under Sec. 13060, relating to selling chances on a pool on the result of an election, and the other under Sec. 13062, for keeping a place where books and slips for wagers were kept and exhibited. No charge was brought under Sec. 13054, for keeping a room to be used for gambling, probably because, under an old decision by Fiedler, Police Judge, gambling in this section was construed to mean a game for stakes. (State v. Lark, 3 O. N. P. 155.)

The State proceeded to trial under Sec. 13062. Judge Silbert overruled the defendant's demurrer that no crime was charged under this section of the code. The State introduced as evidence some racing charts which anyone could purchase in Cleveland, several pads of blank forms, available for recording wagers, a record book in code which was not deciphered, and some slips of paper bearing notations of what might be wagers, chiefly on the results of election, but partly on baseball and horse-races. There was no evidence that a witness had placed a wager or had seen a wager placed.

At the close of the State's case the defendant's attorney moved for a directed verdict and was overruled. Judge Silbert then instructed the jury in substance that the evidence bearing on election bets should not be considered because an election was not "a trial or contest of skill or endurance of man or beast" according to the statute. It cannot be said that the judge was unreasonable in his construction of the statute. The jury returned a verdict of not guilty, which it might well have done in view of the charge and the evidence. The prosecutor then "nolled" the

The Influence of Groups

More important in its effect on the bench than the tendency to respond occasionally to political influence is the bid for support which many judges make to different groups and factions in the city. This is almost entirely a new influence upon the judiciary. "In order properly to play the game," observes one of the more sophisticated judges, "it is necessary for a judge to attend weddings, funerals, christenings, banquets, barbecues, dances, clam-bakes, holiday celebrations, dedications of buildings, receptions, opening nights, first showings of films, prize-fights, bowling matches, lodge entertainments, church festivals, and every conceivable function given by any group, national, social, or religious." Several of the judges have a reputation for "handshaking" nearly every night in the week. One judge of fine, simple nature is reported to have been inveigled into making a speech on the educational and moral value of motion pictures at the first showing of a particularly salacious film. The judge, of course, had not seen the picture. Another judge is said to have refereed a prize-fight. In the past the saloon, as the neighborhood center, has been assiduously courted.[1] Three judges of unquestioned character campaigned by visiting the saloons in the different foreign sections of the city, and were presented to long lines of foreign-speaking voters with the aid of an interpreter. No drinks were bought, not a cent was spent, only handshakes were exchanged, yet this was deemed essential campaigning. All three were reëlected.

1. Racial and Religious Appeal

One of the most disturbing features is the intensifying of racial and religious appeals. A man is elected or appointed because he is a Pole, a Jew, an Irishman, a Mason, a Protestant, and it is sometimes difficult for a committee to reject a candidate without being charged with discrimination. On the other hand, an even more vicious tendency has

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charge under Sec. 13060, which he was justified in doing if, as stated by him, he had no more evidence of selling chances than that already introduced. The police did not admit having any more evidence than that already offered. If all of the parties acted in good faith and told the truth, the case is simply one of a failure by the police to secure adequate evidence.

[1] In a campaign speech addressed to an audience containing many saloon-keepers a judge is quoted as saying the following: "I am a candidate for an office that is important, especially to men like you. You might have a little unfortunate trouble and get into the police court—when you do, you want a man on the bench who is your friend."

begun to appear—the formation of organizations with the avowed or unavowed purpose of "knifing" every candidate who is not of a particular religion, nationality, or color. It is estimated that one such organization last fall, through the expedient of issuing thousands of marked ballots at churches and other places, succeeded in swaying 50,000 votes among the regular nominees. The marked ballot carried nothing to indicate the sectarian nature of the organization, which bore a title similar to that of the Civic League, an impartial organization, and it is not to be supposed that so many voters knew of the dominant motive behind the marked recommendations.

2. Labor Organizations

From time to time, as at present, fierce industrial controversies rage in Cleveland, and there, as elsewhere in the United States, in contrast with England, courts are drawn into the economic struggle. Naturally, therefore, each group is alert to bring its pressure—be it voting strength or dominant public sentiment—to bear upon the courts and to be concentratedly watchful of the group interests. Another manifestation, therefore, of the use of group power is the active participation of certain of the labor organizations in the election of judges. Like other groups, these organizations have often not taken a broad view of a judge's fairness and ability. "The unions have lost faith in the courts," states one of their most respected leaders; "they believe the man who has the influence gets by." So believing, they tend to act on their beliefs and fears—fears not wholly unjustified in past American experience. If a judge renders a decision, however conscientiously made, which is believed to be adverse to the interests of a labor organization, he is apt to be marked for the slaughter. Even a passing remark may be taken to stamp a judge as anti-union and be used to defeat him.[1] Naturally,

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[1] Judge R. M. Morgan rendered a decision in Taylor and Boggis Foundry Company v. Iron Molders' Union, limiting the extent of picketing during a strike. The union construed this decision as hostile, and fought him at the primary as "an enemy of the union." Although Morgan had been making an able judge, he was badly defeated. Even the party organization did not support him. The union claimed the credit of assisting in his defeat.

Judge F. B. Gott was opposed for reëlection in 1918 because "one of our members was called before Judge Gott about a year ago and he asked this brother what he done with his money, and he told him he was a member of the —— Union. The judge in turn told him he had better drop the union, so he also must have a grudge against labor unions." The "member" referred to had failed to comply with an order of the court as to an allowance for his wife and children, giving as an

the converse is also true, that unions will support those "who will give us a square deal when we get into trouble." It is not surprising that this condition produces a judge who flourishes his union card on the bench, and in a suit *quantum meruit* for work done, campaigns for re-election by observing that "a non-union man isn't entitled to receive the union rate of wages." A former judge relates that when he was on the bench two well-known union leaders were introduced to him by his clerk—"no particular business, just to let me know they were on the map."

This situation naturally tends to undermine the character of the judiciary.

There are some critics, notably attorneys for large employers, who would explain all of Cleveland's troubles in administering justice with the observation that "Labor is on top." Little good can come from taking such a simple partisan view. The influence of organized labor is only one of many symptoms of an unhealthy system. If organized labor disappeared completely, the system would be just as unsound and unsatisfactory. The country has had the converse experience with judges imbued wholly with the viewpoint of big business and wants no more of it. The folly of exposing a judiciary to every wind that blows, and then blaming a particular wind, is apparent.

3. Bar Association and the Civic League

The two organizations to which the voting public would naturally turn for leadership in the selection of judges are the Bar Association and the Civic League. The Bar Association contains the men who are best able to weigh the attainments of a judge and who have intimate personal knowledge of all the candidates. The Civic League exists largely for the purpose of furnishing the people of Cleveland with unbiased estimates of the qualifications of public officers. Its wide membership places it above suspicion of ulterior motives. Yet neither the Bar Association nor the Civic League has been wholeheartedly accepted by the people of Cleveland as a guide. That other influences have been at times more potent may be seen in the list of judges who have failed of reëlection since 1912. Judges who have done well in office and become seasoned should, if possible, be returned to office, if the bench is to de-

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excuse that part of his wages went to pay union dues. The judge told him his legal and moral obligation to his family came ahead of the union. In 1912 Judge Gott had led the ticket; in 1918 he was defeated, running fifth in a field of eight candidates.

velop fine traditions and attract men who seek the bench as a life-work and not as a political stepping-stone. Moreover, it is an expensive work to train young and inexperienced men, and the training should not be wasted.

For the most part, in the following list only indorsement of the Bar Association are given, because they were substantially the same as those of the Civic League.

In 1912 Judges Chapman and Ford, two of the most able Common Pleas judges in recent years, were defeated. They were the first and second choice respectively of the straw vote of the Bar Association. In the same year former Judges Keeler, Schwan, and Strimple were defeated, but in these instances the vote of the electorate coincided with the vote of the Bar Association. Those retained in office were Judges Phillips and Babcock, the third and sixth choices of the Bar Association, and those newly elected, Judges Gott, F. E. Stevens, and Pearson, the fifth, eighth, and ninth choices.

In 1914 Judge Collister, the first choice of the Bar Association, failed of reëlection, and Judge Ford, again the second choice, although he had been off the bench for two years, was defeated. Judge Friebolin, who had received an eight to five indorsement over his opponent, failed of reëlection. The successful candidates who ran against these men were Judges Vickery and Neff, third and fourth choices respectively, Judge Kennedy, and newly elected Judges Levine and Powell.

In 1916 three judges were candidates for reëlection and all were elected.

In 1918 Judges Gott and Stevens failed of reëlection. Although the Bar Association vote for that year is not available, these men are concededly two of the ablest on the bench. Judge Morgan, a hard-working, conscientious judge of considerable ability, failed at the primaries. The successful candidates who ran against Judges Gott and Stevens were Judge Pearson, who was reëlected, and Judges F. C. Phillips, Baer, and Kramer, who were newly elected.

In 1920 three judges whose election was contested were returned to office, all of them having been indorsed by the Bar Association in its straw vote. For the new judge the Association preferred Judge George S. Addams, Judge of Insolvency and Juvenile Court, to Judge Florence Allen, who was the sixth choice of the Bar Association, and who led the ticket. The Civic League strongly indorsed Judge Allen.

In the history of the Municipal Court only one judge has failed to be retained in office, and this one was originally appointed. In the first election in 1911 the Bar Association, which had urged the establishment

of the new court, made an active campaign to elect its choice of the judges to the first bench and succeeded. The vote of the Association for 1913 is not available. The three candidates recommended by the Civic League were elected. In 1915 the choices of the association for Chief Justice and for the three six-year terms were elected, but all three of its selections for the four-year terms were defeated.

The vote of the Bar Association for 1917 cannot be located, but three of the Civic League's preferences were elected and one defeated.

In 1919 five of the choices of the Bar Association were elected and two defeated.

In this connection it might be interesting to glance at the list of judges who have resigned from the bench, all of whom were indorsed by the Association and the Civic League.

Before 1912 resignations were infrequent, but during the eight succeeding years the following have resigned[1] from the Municipal bench: Judges Sanders, Bernon, Keough; and from the Common Pleas bench: Judges G. L. Phillips, F. E. Stevens, and Estep. Judge Sanders was subsequently appointed street railway commissioner. Judge Bernon was appointed Common Pleas judge; Judges Phillips and Estep resigned because of age and ill health. The remainder have returned to the private practice of law. It may be said that all of these men were above average ability for their respective benches.

One reason for the partial ineffectiveness of the Bar Association and the Civic League is the fact that, as a general practice, neither organization makes a fight for its recommendations, except by publishing their indorsements in the newspapers. When a real effort is made to elect its choices, as at the launching of the Municipal Court, the entire list may be elected. Few people are influenced merely by reading a list of recommendations, and many voters live beyond the city limits. Meanwhile the influence of the ward politician, the appeal to race, religion, class solidarity, and prejudice, have won the mass of the voters. Moreover, the two associations begin their efforts *after* the primary, so that often they have little or no enthusiasm for their own indorsements.[2] These bodies have a splendid opportunity for intelligent leadership, and since the advent of woman suffrage, a new and powerful source of support.

There has been another reason for the failure of the Bar Association to lead. For a time it was like most other bar associations in the coun-

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[1] Exclusive of resignations after election to a higher court.

[2] "There is no such thing as Bar Association candidates," observes a prominent lawyer, "only those whom they prefer—the lesser of two evils."

try, functioning chiefly to eulogize the dead. It has bestirred itself occasionally when vacancies occurred on the bench, and through committees has conferred with judges regarding changes in rules and practice. It has made possible such reforms, as the establishment of the Municipal Court, certainly a great improvement over the justices of the peace. It has maintained an organization for dealing with grievances against individual attorneys, which has probably functioned as well as most grievance committees. Until recently it had never set itself the definite task, however, of supplying educational advantages to its members, or of lifting the standard of admission to the bar, or of cleansing the profession of pirates and evil practices, or of improving the personnel of the bench. For these reasons the Association was not highly regarded even by its own members, or recognized as a public-spirited organization generally.

This situation is changing at the present time. Under recent leadership, notably that of its present head, John J. Sullivan, and a professional secretary, A. V. Abernethy, the Cleveland Bar Association promises fruitful activity. It holds frequent meetings, addressed by experts on various phases of the law and practice, publishes monographs, maintains an energetic legislative committee, and takes a general lead in matters of chief concern to bench and bar. The vigorous efforts of its executive committee resulted in the prompt retirement of Chief Justice William H. McGannon, in the appointment of Judge John P. Dempsey to succeed him, and the naming of a special prosecutor to purge the city of the disgrace of the three Kagy murder trials. Prominent and busy members of the Association have given generously of their time to aid the Cleveland Foundation Survey. If the Association makes a permanent and dynamic tradition of its present energy and responsiveness toward ethical and public questions, it is certain to capture and hold the confidence of the voting public.[1]

Publicity

Editorially, newspaper support of candidates for the bench has in the main been wisely given. What effectiveness the recommendations of

[1] Some of the members do not yet share the outlook of the leaders. At the meetings on February 16 and 23, 1921, occurred debates over a motion to indorse a bill for the Statutory Organization of the Bar of Ohio. One of the chief grounds of opposition was that the bill contained by inference the admission that some lawyers needed disciplining. A Common Pleas judge who had won a reputation for public service, partly through his own fight against shysters and attendant parasites, opposed the motion on the ground that "lawyers were just as honest as other men."

The motion was lost, 59–49.

the Bar Association and the Civic League have had is due chiefly to the coöperation of the press. The gravest criticism that can be made of the increased editorial power of the newspapers in relation to the bench is that sometimes it comes perilously close to dictating important decisions, and that always the fear of it tends to weaken independence of mind.[1] In a community where the administration of justice may be interfered with by many unseen causes, however, newspaper vigilance has often been exerted in the interest of the public welfare.

1. Self-Advertisement

The real evil in the use of the power of the press lies not in its editorial policy, but in its news column, where the daily publication of a judge's name may lead the public to vote for a judge as naturally and unreasoningly as it asks for the most widely advertised brand of soap. Some publicity is, of course, not only justly earned by a judge, but highly desirable from the public viewpoint, as, for instance, when a judge inaugurates a reform, or hands down a decision on an important and unusual question, such publicity means public education. However, quantity of publicity is more telling than quality. The average voter soon forgets in what connection he has read a judge's name, and knows only that some names on the ballot look familiar and some strange. Then the law of "suggestion" makes him vote for the advertised name.

This kind of voting in Cleveland has produced some curious results At least two candidates, hitherto unknown to the public and of no marked. fitness for the bench, were elected to the Municipal Court because they bore the same names as two retired Common Pleas judges who had built up good will through many years of service. In one election a blacksmith carried Cuyahoga County as candidate for Chief Justice of the Supreme Court of Ohio because his name was similar to that of the well-known judge of the Probate Court. At the next succeeding election for the Supreme Court the same man ran third in a field of seven.

The continued advertisement of a judge's name—or the name of a prosecutor who would be judge—may take place without, and even

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[1] The dilemma of the judges is clearly brought out in a story related by a court reporter of one of the local papers. A judge who had been ridiculed by this paper, in delivering an address, severely arraigned the press for attempting to influence the court and juries. The reporter walked in toward the close of the address and was discovered by the speaker. As soon as the talk was concluded, the judge rushed to the reporter and whispered, "For —— sake, don't handle me too rough tomorrow."

contrary to, the wish of the editor.[1] The newspaper reporters who cover the courts naturally want copy. The judges, too, desire copy and the combination, unchecked, is bringing the bench into a disrepute which attaches alike to the conscientious judge and the guilty "juggler" on the bench.[2] The least judicial and most immoderate judges get their actions into the papers because "it's news," while strict and competent attention to judicial duties is too commonplace for mention. Several years ago a Municipal Court judge began to sentence traffic-law violators with such a heavy hand that he furnished copy to the reporters for weeks. A society woman receiving a workhouse sentence made "a story." In the fall this judge was a candidate for the Common Pleas bench, and although opposed by the press, led the field by a big majority, partly because of the advertisement he had received. A judge now on the Municipal Court bench started the same tactics in the winter of 1921, fining the liquor law violators—for the most part foreigners making "home brew"—unprecedented sums. The newspapers promptly responded with publicity. Many of the defendants were sent to the workhouse to work out fines ranging from $500 to $3,000 at 60 cents a day. These unfortunates were immediately dubbed "lifers," and a fresh run of publicity started, with photographs and interviews.[3] The judge then injected new life into the news by calling publicly for criticism and suggestions. Evidently the comments he received were not wholly favorable, because he soon relaxed his campaign. As a matter of fact, by means of motions in mitigation, quietly allowed, this judge was not exacting greater penalties than his more moderate colleague in the next room, but of this the public was not aware.[4] The man who paid his

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[1] When the Cleveland *Press* sought to fix responsibility for the Raleigh farce, one of the principals remarked: "I don't care what they say about me so long as they keep on publishing my name."

[2] "The Jugglers" is the title of a novel caricaturing the administration of justice in Cleveland—by Ezra Brudno, 1920.

[3] It is comforting to know that most of these workhouse commitments were quietly released—with little publicity, however. Out of 59 defendants committed by this judge in January, for failure to pay fines, by April 19, 23 had sentences suspended by the judge, 24 were paroled by the Parole Board, 7 paid the balance of their fine, and 1 died. The average time actually served was thirty-one days.

[4] In January this judge's average fine (exclusive of workhouse and appealed cases) was, before mitigation, $376.62; after mitigation, $176.61. His colleague's average fine was $299.12; after mitigation, $180.17. Cases begun in January but sentenced after January averaged $322.58 before mitigation, and $122.58 after mitigation. The second judge for the same class of cases averaged $269.23 before mitigation, and $135.90 after mitigation.

huge fine without making a motion in mitigation was penalized for not having a lawyer who "knew the ropes." The judge justifies his conduct on the ground that he never intended the large fines to be paid; that they were simply warnings and had a wholesome deterrent effect.

2. Exploitation of the Police Court

The two judges cited are perhaps most extreme examples, but even without such campaigns the police court furnishes lime-light enough. To serve in the police court during election year is a political asset, and the schedule of the judges is apparently conveniently arranged so that all judges facing reëlection are given the opportunity to serve on the criminal side during the preceding nine months. If necessary, the regular sitting of a judge not up for reëlection is shifted to a colleague who is.

In November, 1913, the following Municipal Court judges were candidates to succeed themselves: Judges Beebe, Cull, and Sanders, and although we have no record of the regular assignments for this year, these three men served on the criminal division during most of the year.

In November, 1915, the following judges were candidates to succeed themselves: Judges Baer, Bernstein, Kramer, and McGannon, all of whom were assigned to the criminal division during this year. The one other judge who was assigned for a term did most of his service after the election.

In November, 1917, the following judges were candidates to succeed themselves: Judges Beebe, Cull, and Keough; all of them were assigned to the criminal division during this year. The only other judge who was assigned for a term apparently yielded a portion of his assignment to the others.

In November, 1919, the following judges were candidates to succeed themselves: Judges Moylan, Pearce, Howells, Terrell, Selzer, Silbert, and Sawicki, the first five of whom were regularly assigned to the criminal division. Judges Silbert and Sawicki, however, were worked in shortly before election—Judge Silbert for more than three months and Judge Sawicki for one month.

The election for Common Pleas judges is held in the even years, and here again a relationship exists between service on the criminal division of the Municipal Court and the judge's candidacy for the Common Pleas bench the same year.

In 1914 Judges Levine and Sanders were candidates for the Common Pleas Court, and during the same year both served on the Criminal Division. In 1916 no Municipal Court judges were candidates. In

1918 Judges Baer, Kramer, F. C. Phillips, and Cull were candidates for the Common Pleas bench, and all served in the criminal division, the first three by assignment, and the last being given a month by courtesy or exchange. In 1920 Judge Beebe was a candidate, and although not regularly assigned to criminal work, served over five months in that division.

The success of this kind of publicity is seen in the fact that out of a total of nine new Common Pleas judges elected since 1912, six are former Municipal Court judges, and a seventh is a former assistant county prosecutor. Only two Municipal Court judges have been defeated for the Common Pleas bench.

Of the six former Municipal Court judges, four started their careers as police prosecutors. Out of 18 Municipal Court judges elected since its organization, eight began in the police or county prosecutor's office. This tendency has become less evident of late, however, since out of nine Municipal Court judges now serving, only two began as police prosecutors. It is difficult to say what has caused this shift, unless it be a change in the quality of police prosecutors, who now seem to be moving into the county prosecutor's office or becoming police court lawyers.[1] The injury to the prestige and self-respect of the bench through the conscious exploitation of the criminal branch needs no comment.

There is apparently no established practice in the Common Pleas Court of using the criminal division for publicity purposes in election year, although it is undoubtedly so used on occasions. Sometimes a candidate for reëlection will take two terms as presiding judge of the criminal branch before election, as Judge Ford in 1912, Judge Lieghley in 1914, Judge Powell in 1916, and Judge Kennedy in 1920. The temptation and perhaps even the necessity of bench publicity are unfortunately present in the Common Pleas Court as in the Municipal Court.[2]

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[1] The quality of police prosecutors is part of the study of that office, rather than of the bench. Newton D. Baker, the first city solicitor to appoint police prosecutors, inaugurated a policy of appointing "youngsters with ideals fresh out of the law school." The ability of his keen juniors to improve their opportunities soon landed five out of six on the Common Pleas bench, with scarcely any of the seasoning which comes from private practice.

[2] A judge who would not be classed as a self-advertiser was hearing an important injunction suit which lasted several days. After court had adjourned for the day, the case still pending, a reporter stopped the judge as he was leaving the bench with, "Just give me the high points, Judge." Wearily, but patiently, the judge detailed the day's progress for the reporter. The impropriety of a judge reviewing for the press a case pending in his own court apparently shocked no one.

3. Character of the News

As long as newspapers print as news every extreme utterance or irrelevant whimsy, they will fail to educate the public to a relevant appraisal of the bench. It is easy to understand why a newspaper which prints the following about a judge cannot defeat him at the polls: "Municipal Judge —— ate candy as he listened to testimony Friday. 'It keeps one from getting nervous,' the Judge says."[1]

Another form of publicity which the present mode of selection has brought into prominence is the advertisement which must be bought. Where formerly judges were timid about such a small matter as distributing cards, there is no hesitancy today about elaborately conceived advertisements. Pictures showing a judge listening kindly to the whispers of a poor litigant or being appraised by an appreciative public are some of the forms of campaign publicity.

4. Campaign Funds

There is one aspect of purchased publicity which ought to be stopped immediately, namely, the solicitation of campaign funds, especially among lawyers. So far the reports of such funds concern only a few judges, but unless curbed, other judges will be compelled to permit collections in their behalf. It would be difficult to conceive a more degenerating influence than the giving of campaign funds by lawyers in behalf of a judge before whom they expect to practise.

Recommendations

From the foregoing it will be seen that the wide-open elective system in Cleveland has up to the present time developed no predominant *de facto* method of appointment. The community has been unable to avoid the chaos regarded as an impossible result by the American Judicature Society.[2] Its bench, therefore, reflects the many influences at work upon it. Rarely does a judge represent the purposeful, discriminating choice of the community.

Only in the filling of vacancies has a real appointive power asserted itself. Unfortunately, the local executive committee of the political

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[1] A judge known for his efforts along constructive lines caught a former chief of police "cribbing" someone else's speech on a public occasion. The editor of one of the papers which made a sensation of the exposure congratulated the judge with the remark, "This is the best thing you've ever done." "How about my part in ridding Cleveland of justices of the peace?" queried the judge. "Oh, that was all right," replied the editor, "but this is the biggest yet!"

[2] *Bulletin IV-A*, American Judicature Society, p. 9, 1915, Chicago.

parties has usually seized these opportunities, the Bar Association not being, as a rule, aggressive.

1. Appointed and Elected Judges

Owing to the frequency of vacancies caused by resignation and death, it is possible to draw a comparison between men appointed by the Governor to fill unexpired terms and those who became judges for the first time through election. Of course, most of those appointed were subsequently elected, but the comparison is relevant only to the modes of selection in the first instance. Care should be taken not to regard the list as furnishing typical examples of elected and appointed judiciaries, since this would be misleading. Governors, in making appointments to fill short unexpired terms, are not guided by the same sense of responsibility as governors in other States charged with the responsibility of naming judges for life. The nominees must in any case face an election in a few months,[1] so that the sense of responsibility to the public is largely outweighed by the necessity of securing the continued support of the local machine. The local organization is not made up, in the main, of men of great intelligence or vision, because of the abhorrence of politics felt by men of this type. Selfish personal motives or the instinct of political self-preservation dominate the local machine, and its nominations to the Governor are apt to represent payments for political debts, or the best chance to win the subsequent election. "Has he earned it and can he win?" asks the local committee, and the Governor usually queries, "Is he decent?"[2] The public has the best chance when the party in power fears defeat at the next election, or when some dramatic episode focuses attention on the forthcoming appointment.[3]

With these qualifications, the lists of judges first appointed and first elected may be compared. On the whole, the opinion is probably warranted that the appointments, especially those to the Municipal

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[1] Appointed judges must defend their office at the next succeeding election.

[2] "The mere fact that he has no brains will not disqualify him for the appointment," said one man who has an intimate knowledge of these appointments over a period of years; "unfortunate is the man who has nothing to recommend him but qualifications for the office!"

[3] The excellent appointment of John Dempsey in March, 1921, to succeed W. H. McGannon as Chief Justice of the Municipal Court, is an example. Governor Davis and the local committee set a wholesome precedent by virtually accepting the nominee of the executive committee of the Bar Association. It would be advisable, however, if the Bar Association committee sent in several names instead of one when vacancies occurred.

Court, do not include men as conspicuously unsuited for judicial office as a few of those elected.

It should also be remembered that the judges elected to the Municipal bench in the first election in 1911 were "hand-picked" and virtually appointed. Both lists include men of outstanding ability, and there is apparently no lesson to be learned by comparing the age and previous experience of the men in the two lists. All the judges known for their talent in securing publicity are contained in the elected list. Probably the only clear moral which can be drawn is that a heavily embarrassed system of appointing produces as good, but not as poor, results as the present method of popular election. The lists follow:

COMMON PLEAS BENCH

Judges elected and appointed since 1900

Appointed	Elected	
1900–1911	1900–1911	
Shallenberger	Babcock	Keeler
G. L. Phillips	Tilden	Estep
	Kennedy	Vickery
	Lawrence	Collister
	Schwan	Foran
1911–1921	1911–1921	
Lieghley	Gott	Cull
Friebolin	Pearson	Kramer
Morgan	F. E. Stevens[1]	F. C. Phillips
Day	Powell	Terrell
Bernon	Levine	Allen
	Baer	

MUNICIPAL COURT

Bernon	Beebe	1911 Election
White	Sanders	
Keough	McGannon	
Day	Kramer	
Selzer	Baer	
Sawicki	Cull	
Terrell	Levine	
Howells	McMahon	
Pearce	Moylan	
Dempsey	Silbert	
	F. C. Phillips	
	F. L. Stevens	

[1] Subsequently appointed after being defeated for reëlection.

2. The Use of Vacancies

If the opportunity were skilfully employed, vacancies might be used to improve greatly the personnel of the bench, since appointed judges have a large advantage in the ensuing election. This is a matter for the Bar Association to take up with the local executive committees of the parties, with a view to inducing these committees, as in the Dempsey case, to accept the nominees of the Association. The Bar Association should either hold a primary and recommend the winners to the Governor, or recommend several alternate choices so that the Governor may have some latitude.

3. Selection in the Usual Course

With respect to the selection of judges in the usual course, the following methods are recommended in order of preference:

(1) The appointive method, with provision for a retirement election whereby a judge runs against his own record.
(2) A modified appointive method, as, for example, an elective Chief Justice who appoints his associates.[1]
(3) A modified elective system whereby judges are elected for a short first term, but if reëlected, then for progressively longer terms. Judges standing for reëlection should not run against other candidates, *but only against their own records.* The single question presented to the electorate should be, "Shall this judge be retained?"

If the judge is defeated, his successor should be chosen at the next succeeding election.

These three recommendations, in order of preference, are probably in inverse order of probability of achievement. It is, therefore, most useful to consider the third suggestion. The provision for a short trial term gives the public an opportunity to learn what character of a judge it has chosen. If the short term record is satisfactory, the judge will be returned for a longer term, thus giving the community the benefit of his judicial growth and experience. By eliminating a campaign against rivals and confining a judge to the single issue of his service on the bench, it is hoped that many of the evils of electioneering will be eliminated and that a tradition will be established of giving practically a life tenure to

[1] It is not intended here to discuss at length various suggested plans. They have already been the subject of searching study. See *Bulletin IV–A*, American Judicature Society, 1915, Chicago.

able judges. Cuyahoga County has already established such a tradition with respect to the probate judges, who have bee n usually unopposed at elections. Such a tradition can be established for the other courts if the judgeships are not "scrambled" among a field of candidates.

4. Joint Committee on the Judiciary

Even under such a plan, however, it would be necessary to select new candidates for the initial and special elections. It would become necessary for Cleveland to mobilize its most influential and intelligent forces so as to bring about concentration of electoral power on the most desirable candidates. In Cleveland the strongest forces are the party organizations and the press, and the most intelligent, the Bar Association and the Civic League. The following suggestion is already in the minds of many thinking men of Cleveland of both parties, and if put into effect, would do much to improve the personnel and standing of the bench.

There should be a joint committee on the judiciary, composed of not more than three members of the executive committee of each of the major party organizations and of the Bar Association, and representatives of the leading civic organizations. This joint committee should then select a slate of candidates to be supported at the primaries and at the election. From the coöperation which the press has given in the past to occasional joint efforts of this sort, such a plan would almost certainly be welcomed and supported by the great dailies of Cleveland.

Of course, the mere indorsement of a joint slate would not be sufficient. The political organizations of each party would have to produce results at the polls, and to the Bar Association and Civic League would fall the task of organizing and directing the intelligent citizenship.

CHAPTER V

THE MUNICIPAL COURT

THE present Municipal Court was launched in 1912 with fine civic enthusiasm, in the belief that Cleveland had finally attained a modern city court. It is not within the scope of this report to consider whether or not the high hopes of those days have been realized so far as its civil jurisdiction is concerned, but nine years of experience do not justify any satisfaction with the handling of criminal causes. Lawyers and public officials appraise the criminal division of the Municipal Court when they persist in calling it, as they called its predecessor, a "police court."[1]

Physical Conditions

Civil causes, however small, are heard in the imposing new City Hall on the lake front, in court-rooms of dignity and charm; criminal causes, outside of the few jury trials held in the City Hall, are tried in the old police court-rooms at the corner of West Sixth Street and Champlain Avenue, N.W. This small building is used for police headquarters, bureau of criminal identification, office of city prosecutor, probation office, clerk's office, city jail, as well as court-house, and is inadequate for all these purposes. Several years ago the city voted $1,250,000 for a new jail and criminal court. The commission began work on the lake front and then asked for additional bonds for the building. The voters of Cleveland refused the request, and the city has, therefore, gained nothing but an excavation. It is not necessary to build edifices like the City Hall or County Court-house, but a community which could erect those buildings should not accept the present stalemate with respect to an institution even more vital to its citizenship. A simple, modern criminal court-house and jail is an immediate necessity. One way of securing it speedily would be to compel the leading citizens of Cleveland

[1] Since this report is based upon a study of the court as it was in the early months of 1921, it is in no sense a criticism of the new Chief Justice, Judge Dempsey, who was appointed in March, 1921, and who was unable to attack the problems in the criminal branch until May because of the unprecedented congestion of the civil list. On the contrary, Judge Dempsey has given evidence that he appreciates many of the evils and shortcomings pointed out in this chapter, and has already, on his own initiative, begun some badly needed reforms, such as the division of cases into sessions, and the starting of process in certain cases by court summons.

to attend one of the daily sessions of the "police court." A former municipal judge has recommended that "the place should have a hose turned on it." After this is done, a carpenter, a painter, an electrician, and an expert on ventilation should be called. Their services would make the place tolerable until new quarters are available. Little can be done, however, to relieve the extreme congestion of the auxiliary departments. It is greatly to the credit of the clerks' and probation officer's staffs that they have been able to work with any degree of success amid such an environment.

Decorum

Accepting the court-rooms as they are, little can be said for the conduct of cases therein. From 150 to 300 cases a day are assigned to the two court-rooms, and the visitor is immediately struck with the lack of orderliness in handling the list. The lawyer who has only an occasional case, perhaps an ordinance violation, may wait with his clients and witnesses from nine o'clock until two, not knowing when his case will be reached. This apparent chaos is, of course, to the advantage of the regular "police court lawyer," who has a number of cases each morning.

The decorum in Room 1 is somewhat better than in Room 2, but the first room has higher ceilings and is better adapted for hearings. On a day during the period covered by the survey Judge Howells was sitting in Room 1 and Judge F. L. Stevens in Room 2. In neither room did the proceedings reveal the necessary dignity of a court. The rooms were crowded with lawyers, defendants, witnesses, police, hangers-on, and sightseers, many chewing gum or tobacco, even when addressing the court. In Room 2 an attorney was waving a cigar in the judge's face by way of emphasizing his argument. Crowded around the bench were lawyers, witnesses, and officials, almost screening from view the testifying witness. Others in the court-room were standing about talking and were occasionally asked by the judge to be quiet in order that he might hear the testimony—this, although the witness chair was placed directly against the judge's bench. The only person who seemed to be able to follow the testimony was a young woman reporter from one of the newspapers who took up a position behind the witness-chair.

In order to make themselves heard in this court-room, lawyers and others have to lean over the bench to address the judge.[1] This produces

[1] Formerly the end of the bench was open so that attorneys, politicians, etc., could go in back of the bench to whisper. When Judge Levine was in the Municipal Court he had long arms put on the ends of the bench, so that all conversation had to be held across it. These arms are now a permanent part of the equipment.

an impression of a confidential communication, which, although false, lends color to the belief that certain lawyers have "pull with the judge."

The question of decorum lies with the judges. A space should be cleared before the bench and on both sides, marked off with a railing, and no one should be allowed within the inclosure except attorneys in good standing. Everyone should be compelled to sit while the court is in session, and if every seat is taken, no additional persons should be admitted. Any talking during a hearing should be immediately suppressed. Several years ago Judge Selzer had the witness-chair moved away from the bench so that its occupant could not give the appearance of talking for the judge's ears only. On account of the poor acoustics and confusion in the court-room the chair is again next to the bench. It should be moved away, and if order is maintained, a witness can make himself heard clearly enough.

Separate Sessions Recommended

Separate sessions dealing with different groups of cases should be established, as, for example, one for misdemeanors and ordinance violations criminal in nature; one for felony examinations; one for women offenders; and one for violations of ordinances only quasi-criminal in their nature. Possibly the last mentioned might be held in the City Hall in order that otherwise law-abiding citizens may await their turn and have their cases heard in an atmosphere less suggestive of crime and degradation. During the trial of a sexual offense the court-room should be cleared of everyone not concerned in the particular case. It may also be possible to hold different sessions in the morning than in the afternoon. At present there is a rough division of cases, Room 1 being used for "city cases" (ordinance violations) and Room 2 for "State cases" (misdemeanor and felony examinations).[1]

Shifting Cases from One Judge to Another

One of the assistant clerks has discretion to decide whether the list in one room is congested so that cases should be transferred from one session to the other. Since a lawyer may get along better with a certain judge than another, or the disposition of a judge may be known to be strict or lax in certain classes of cases, this discretion often exposes the

[1] In 1920 these cases were divided as follows: felony examinations, 3,064; State misdemeanors, 11,843; ordinance violations, 11,181. Since 1912 felony examinations increased 204 per cent.; misdemeanors, 167 per cent.; ordinance violations, 376 per cent.

clerks in charge to great pressure to transfer cases from Room 2 to Room 1, and vice versa. It is impossible to ascertain how many cases are shifted upon solicitation,[1] but the atmosphere is charged occasionally with rumors that certain cases are "thrown" before a particular judge.

Table 10 may be significant as showing the tendency to shift cases. During the winter of 1921 Judge Stevens sat in Room 2, and in January startled the community by his severity in handling cases of State liquor law violations which came up properly in Room 2. Judge Howells, sitting in Room 1, acquired a reputation for being only moderately severe in handling such cases, so that it was regarded as more advantageous to be tried by Judge Howells than Judge Stevens. Judge Sawicki sat for Judge Howells during one week in January.

TABLE 10.—SHIFTING OF CASES IN MUNICIPAL COURT, JANUARY, 1921

	Judge Stevens	Judge Howells	Judge Sawicki
1. Total arraigned in January and ultimately disposed of by	311	166	58
2. Number disposed of in January by	260	106	58
3. Number arraigned in January but "passed" into succeeding months ultimately tried by	51	60	..
Subdivision of Group No. 3:			
a. Arraigned before Stevens, tried by Howells	..	28	..
b. Arraigned before Howells, tried by Stevens	..	..	..
c. Arraigned before Sawicki, tried by Stevens	..	..	..
d. Arraigned before Sawicki, tried by Howells	..	3	..

It so happened that Judge Stevens became more moderate after January 31, due perhaps to the rather unfavorable reception of his spectacular procedure, and Judge Howells grew stricter, perhaps unconsciously influenced by Judge Stevens' severity, so that the shifted defendants did not profit greatly. Table 11 shows these dispositions.

TABLE 11.—ORIGINAL DISPOSITIONS OF CASES IN MUNICIPAL COURT, JANUARY, 1921

	Number fined	Average fine	"Nolled"	Discharged	Total
a. Arraigned before Stevens, tried by Howells	12	$271.42	2	14	28
b. Total tried by Stevens	249	452.21	18	44	311
c. Total tried by Howells	100	294.45	7	59	166

[1] The records of the clerk's office are discussed later.

Scant Attention to Individual Cases

With the cases organized into different lists for different sessions, it may be possible to avoid some of the waste time now involved in waiting for cases to be reached. The principal advantage, however, would be to enable the judges to give more attention to individual cases. Unless a case is of public importance, has news value, or has interested influential people, it is apt to be disposed of before one can say the proverbial "Jack Robinson." This results practically in depriving of his day in court the poor or ignorant petty offender, and plays directly into the hands of the defendant with "wire-pulling" friends. Table 12 gives the number of dispositions in the criminal branch compared with the number in the civil branch of the Municipal Court, showing the amazing discrepancy between the time devoted to deciding questions involving, on the whole, petty property rights, compared with those involving individual liberty.

TABLE 12.—COMPARISON OF NUMBER OF CIVIL AND CRIMINAL CASES PER JUDGE, MUNICIPAL COURT, 1919

Criminal cases, average per judge		Civil cases filed, average per judge		Civil cases disposed of, average per judge	
1. State examinations	1,723	1. Over $300 and equity	446	1. Over $300 and equity	386
2. Misdemeanors	5,398	2. Tort less than $300, contract $100–$300	867	2. Less than $300 and miscellaneous (exclusive of conciliation)	2,036
3. Ordinance violations	4,767	3. Contract less than $300 and miscellaneous	1,354		
		4. Conciliation	685		
Criminal per judge	11,888	Civil per judge	3,352	Civil per judge	2,422

In the hurly-burly of the day's work the judge cannot examine closely into statements and excuses of lawyers, police prosecutors, and police officers, and this affords opportunities either to escape the law by "putting it over" the judge or hastily to punish the innocent.

Bad Effects of Many Continuances

Most serious of all is the practice of continuing or passing cases. Rule 3, of the Municipal Court,[1] criminal branch, relating to con-

[1] "Motions for a second continuance must be in writing, setting forth the facts and reasons therefor (unless dispensed with by the court). * * * "

tinuances, has become atrophied. It is the object of every police court lawyer to get his case continued as many times as is necessary to disgust the witnesses for the State,—who have been wasting their time in a most disagreeable place,—and to cause the prosecuting police officer to lose interest in the case in the face of more pressing matters.

Table 13, based upon a study of every tenth case in the criminal branch for a period of two years, gives the average time between arrest and disposition. It is to be noticed that it takes the least time to find a defendant guilty, a longer time to discharge him, and the longest time to "noll" or dismiss his case. This table is based on *all* cases, including those ill-advised offenders who allow their cases to be heard on the same day as the arrest, so that the intervals are shorter than they would be if the table were confined to continued cases.

TABLE 13.—AVERAGE NUMBER OF DAYS BETWEEN ARREST AND SENTENCE, MUNICIPAL COURT CASES, 1919–20, CLASSIFIED BY DISPOSITION AND BY TYPE OF CASE[1]

	State examinations		State misdemeanors		City misdemeanors	
	Number of cases	Average number of days	Number of cases	Average number of days	Number of cases	Average number of days
Discharged	81	8.1	285	6.0	224	4.9
Guilty of offense charged	..	..	1,381	3.1	1,325	3.3
Guilty of lesser offense	35	7.1	..	..	..	..
Bound over	446	3.3	..	..	..	..
No papers	4	..	1	..	..	..
Nolle prosequi	58	18.0	84	11.3	133	12.5
Dismissed, want of prosecution	14	10.1	79	13.7	4	2.3
Miscellaneous	4	..	8	33.8	4	6.0
Total	642	5.5	1,838	4.4	1,690	4.2

A study of cases of violation of the State liquor law (Table 14), brought before the court in January, 1921, shows that cases which were disposed of in the same month received severer fines, contained a smaller per-

[1] The number of these cases is not equal in the aggregate to the total number of cases, because the data of time interval are not available in every case. The term "sentence" means the final disposition of the case, whether or not found guilty, except in those cases in which action, such as mitigation, was taken by the court after sentence: in the latter case the term "sentence" is used in its literal significance.

centage of "nolles" and discharges, and a much greater number of workhouse commitments than the cases which were "passed" into succeeding months.

TABLE 14.—CASES OF LIQUOR LAW VIOLATION ARRAIGNED IN JANUARY, 1921[1]

	Number	Per cent.	Average original fine	Committed to workhouse for failure to pay fine
Sentenced in January	307	74	$422.70	62
Discharged in January	93	22	..	..
"Nolled" in January	17	4	..	..
Total	417	100	..	..
Sentenced after January 31	74	67	309.45	4
Discharged after January 31	28	25	..	..
"Nolled" after January 31	9	8	..	..
Total	111	100	..	..
Grand total	528	..	..	..

Cases in which continuances are of most advantage to the defendant are those in which the witnesses are disinterested bystanders, as in automobile accident cases resulting in charges of manslaughter or driving while intoxicated. "Continuances kill accident cases," says a police officer posted in the court-room. "The witnesses won't come down and swelter, or else they move in the meantime. The regular lawyer's game is to tire out the witnesses."[2]

Such continuances not only enable the guilty to escape, but play into the hands of unscrupulous lawyers who desire to use the criminal court

[1] Exclusive of cases appealed.

[2] A typical case is No. 67557, manslaughter charge, the complaint alleging reckless driving while drunk. The notes in the police records and statements secured tend to establish clearly that the defendant was going at an excessive rate of speed and was intoxicated. The two police officers whose testimony would have been most positive as to the intoxication were not called, and the case was continued after at least one of the important witnesses had testified. The entries are:

"July 22, continued to July 29, continued to August 26, continued to September 16, continued to September 30, discharged by Judge ——."

to exact payment of a civil claim for damages, whether well founded or not.[1] If the case were tried immediately upon its merits, such lawyers would be unable to use the machinery of criminal law as instruments for extortion.

The "Motion in Mitigation"

The tendency cannot be effectively curbed, however, unless the "motion in mitigation" is eliminated from the practice of the court. This motion, apparently peculiar to the police court, makes a farce of judicial business, more than any other single factor. After a defendant has been adjudged or has pleaded guilty, the court imposes sentence. To the uninitiated the case is over, but this is not so. A "motion in mitigation" is then made, which is sometimes granted the same day, after trial, and sometimes ruled upon weeks and even months later, after many continuances.[2] Thus the court satisfies the complaining witness in open court, and has the opportunity later to placate the defendant's lawyer. Lawyers report instances where their clients were found guilty, though clearly innocent (in the belief of the defendant's lawyer), and upon protesting against the "outrage" of a conviction, were advised to make a "motion in mitigation." This they did, and the motion was later granted.

The "motion in mitigation" affords the setting for the performing judge, enabling him to do "stunts" which get into the front page of the newspapers, and then to undo the damage quietly at a later date. Mention has already been made of Judge Stevens' campaign against liquor law violators during January, 1921, and the notoriety which resulted from it. Considering the fines for this offense during 1919 and 1920 (taking every tenth case), 61 per cent. were less than $200 and 99 per cent. less than $400. About 26 per cent. of these sentences were suspended. The average original fine imposed by Judge Howells for January, 1921, was $299.12, and the average fine imposed by Judge Stevens (exclusive of five appealed cases)[3] for the same period was $468.72.

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[1] Several cases of alleged extortion have been brought to the attention of this survey.

[2] On November 23, 1920, Louis Ettkin was fined $200 and costs for violating the liquor law, and the same day the fine was changed to $100 and costs. Notice of motion in mitigation was given, and the case continued eight times until February 21, 1921, when the execution docket shows the entry, "motion in mitigation overruled." The original file, however, shows that at some stage $75 was suspended, so that Ettkin paid $25 and costs on February 21. Meanwhile bond had been forfeited twice and the forfeitures set aside.

[3] The inclusion of appealed cases would make Judge Stevens' average a trifle higher.

Excluding cases sentenced to the workhouse for failure to pay fines, Judge Stevens' average fine was $376.62. The average amount actually paid in Judge Howells' cases was $180.17 and in Judge Stevens' cases (exclusive of workhouse commitments), $176.61. The "motion in mitigation" is thus seen to be a leveler of fines in this particular group of cases.

It is said that the "motion in mitigation" serves the purpose of allowing a defendant time to pay his fine, and after the fine is paid, the motion is overruled as a matter of form. Undoubtedly the motion is used for this purpose and also to allow the court time to investigate the defendant to ascertain whether the fine imposed is a just one. The vice of the motion is that the court apparently disposes of the case, and at a later date, when no witnesses are present, makes a change. This vice is intensified by a system of record keeping, discussed later, which makes it difficult to find out what actually happened in a particular case. The court should make its investigation *before* sentence, not afterward, and the sentence once imposed, should stand. This could be accomplished by continuing a case for sentence to a certain day after the issue of guilt is determined, in case the court wishes further advice as to the condition of the defendant. This method would be more apt to impress the defendant with the seriousness of the court than the game of thimble played with motions in mitigation.

The extent to which these motions are used may be seen in the fact that of 314 fines for liquor law violation in cases originating in January, 1921,—exclusive of cases subsequently appealed or committed,—totaling $101,650, motions for mitigation were made in 193 cases and allowed in 114 cases, reducing the fines by $42,135.[1] Of these fines, 131 were over $200 each, totaling $75,500, in which 103 motions in mitigation were made, 85 of which were allowed for a total reduction of $39,150, or nearly 52 per cent. in amount. An average of 15.43 days was required to overrule a "motion in mitigation" and an average of 35.15 days to grant it. In cases where the fines were more than $200 each, an average of 23.5 days was required to overrule the motion and 36.24 to grant it. As in the case of the hearing on the merits, delay favors the party who can keep longest alive his motion in mitigation.

The "Police Court Ring"

Owing to the fact that no record is kept of attorneys in cases before the criminal branch of the Municipal Court, no statistical data can be

[1] This is exclusive of cases where fine was suspended in whole or in part on the day the fine was imposed. Counting such suspensions with the motions in mitigation, the total reduction from original fines was $48,885, or 32.3 per cent. in amount.

submitted of the attorneys practising in this court. It is common knowledge, however, that certain attorneys monopolize most of the business, and in a rough fashion divide the practice among themselves. Thus one group represents prostitutes, another pickpockets, another suspicious persons, etc. Any one connected with the court knows the names of these attorneys.

Theoretically, there is no objection to a limited group practising in a particular court. Indeed, under wholly different conditions a limited group of advocates would serve to facilitate the administration of justice by focusing responsibility for the ethical conduct of cases on a definite group. In the "police court" of Cleveland exactly the opposite has resulted. Men of ability as lawyers, or of fine sensibilities, shun this court, so that there is a tendency for men of less refinement to drift into the practice. The activities of these men are nowhere spread upon the record; they involve people who dare not or do not know how to complain. Some of these lawyers were formerly police prosecutors, in which capacity they made the acquaintance of habitual offenders and professional crooks; some are city councilmen with a voice as to the salaries of certain court attendants and a control over votes, which a weak judge cannot entirely overlook; others are connected in various ways with people of political importance.

In the trail of the police court lawyer come the "runner" and the "professional" bondsman, not even subject to the slight check of belonging to the legal profession. Some of the bondsmen are notorious characters, others operate gambling places in the guise of "political clubs." The presence of these men in the corridors of the court-rooms gives rise to rumors of "underground" connections with certain prosecutors, which, even if false, greatly damage respect for the courts in the minds of the unfortunate and their friends.

In some cases these lawyers and "runners" have been compelled to pay back to clients money which they extorted under the claim of "influence." Years ago a police prosecutor, now a Common Pleas judge, tried and convicted one of these men for obtaining money under false pretenses, before the very judge with whom the lawyer claimed to have influence. Judge Howells became for a time so disgusted with lawyers defending prostitutes that he arbitrarily refused to permit any lawyer to represent a prostitute before him. He had just fined a prostitute $10 when the police prosecutor whispered to him to suspend the sentence. The lawyer also urged suspension on the grounds that his client could not pay the fine. On inquiry the judge learned that the girl had paid the lawyer a fee of $75. It is said that formerly a custom obtained of raiding

prostitutes when the city needed money, and although this custom has been stopped if it ever existed, there is some opinion to the effect that they have been occasionally arrested when their lawyers needed money. Except in an unusual case, the prostitute fares as well or better in court *without any police court lawyer*, especially since the establishment of the Woman's Probation Department under Mrs. Antoinette Callaghan.

TABLE 15.—PERSONS ARRESTED FROM JANUARY 1, 1918, TO DECEMBER 14, 1918, RELEASED ON BAIL BONDS SIGNED BY..... AND REPRESENTED BY..... AND ..... ATTORNEYS[1]

Disposition of cases	Number	Per cent.
Bound over to grand jury	30	14.0
Workhouse sentences	20	9.3
Workhouse sentences suspended	27	12.6
Money fines only	5	2.3
Money fines suspended	4	1.9
Discharged	44	20.7
"Nolled"	59	28.0
No papers	11	5.1
Bond forfeited, capias	7	3.3
No disposition	6	2.8
Total	213	100.0

It is no longer necessary for police court runners to look over the contents of the "bull pen" for old and new clients.[2] Some look over the police blotter, and, it is charged, sometimes secure the release of prisoners on personal bond (without surety) in order to make them retain the

[1] These men were called counsel for the "International Association of Pickpockets." The firm has not been active in the Municipal Court since the grand jury investigation of 1919. The figures are submitted, however, as showing a state of things which probably exists as to some other Municipal Court lawyers, if the records were available for study. Pocketpicking has fallen off greatly since this firm ceased to be active. One member is an ex-police prosecutor; the other has since been convicted of arson, case reversed on error in the Supreme Court; both men were formerly associates of a prosecuting attorney for Cuyahoga County.

[2] "One visit to the central court is usually sufficient for a stranger—one day's visit to the place being as complete as a month's sojourn within its desolate walls. * * * Yet there are a few lawyers in this city who make a practice of habituating the place, picking up such crumbs as these, managing somehow to exist on them. They can be seen every day, a half-dozen or so of them, waiting in eager expectation for the herd to be driven in from the pen; and if one of them looks as though he might have $5 about him, he is besieged by anxious solicitors, ready and willing to take his case."—Kennedy and Day, *Bench and Bar of Cleveland*, 1889. The spirit of the place has not altered greatly in over thirty years.

lawyers in question. For some of the lawyers this is unnecessary because their clientele and reputation are established.

Until recently the lawyer himself could be bondsman for his client. Happily, this vicious practice is ended by a court rule, but not without leaving an indication of the activities of a certain group of lawyers who acted as bondsmen for clients whom they represented.

The length of their trail can be judged from figures in Table 15, compiled by the Bureau of Criminal Identification, Division of Police.

These cases included 125 known criminals whose pictures were in the Rogues Gallery at the time of their arrest. These were disposed of as in Table 16.

TABLE 16.—DISPOSITION OF CASES OF 125 KNOWN CRIMINALS

Disposition	Number	Per cent.
Bound over	18	14.4
Fined, suspended	1	0.8
Workhouse	12	9.6
Workhouse, suspended	18	14.4
Discharged	24	19.2
"Nolled"	38	30.4
No papers	6	4.8
Bond forfeited, capias	5	4.0
No disposition	3	2.4
Total	125	100.0

Many of these criminals were notorious offenders, and some were subsequently implicated in murders in Cleveland. Some of those not included in the list of known criminals have later been added to this class by the police.

It cannot be said that the judges are individually responsible for the record shown by these cases. In the great majority of the felony charges the defendants were bound over for the grand jury.[1] In the other cases the story is told in the number of cases "nolled" and "no-papered" by the police prosecutor. The former is done by motion before the court; but the absence of centralized judicial administration through a watchful and directing administrative head, the great confusion of the court, and lack of a courageous, highly skilled, and completely disinterested prosecutor, or failing that some "*amicus curiae*" upon whom the court can

[1] An ex-judge stated that he informed one of these attorneys that all of his clients accused of pocketpicking were guilty. They would never take the stand for fear the police would fasten their record upon them.

rely for disinterested advice, are largely responsible for the court's part in cases "nolled" and sentences suspended. The police court lawyer is most adept in taking advantage of those conditions which inevitably make for abuse of law and the defeat of its purposes.

Bail Bonds

Because of the reaction occasioned by the "crime wave" and obvious breakdown of the courts, the bail bond situation in the Municipal Court has received a wrong emphasis. In the matter of assuring the attendance of the defendant in court, bail is not a serious problem. During the nine years of the Municipal Court to January, 1921, there have been approximately 2,200 forfeitures of bail bonds which had not been set aside either by producing the defendant or through purging him of contempt. Compared with 170,137 cases disposed of during this period, this is a relatively small number. Of 562 cases of liquor law violation before the court in January, 1921, only six bond forfeitures were still outstanding on April 19, 1921.

The real evil in the situation is not the matter of easy bail, but the disreputable professional bondsmen who make a business of exploiting the misfortunes of the poor, and whose connection with "runners" and "shysters" tends to prostitute the administration of justice in the inferior courts. To eliminate the professional bondsmen requires not a stiffening in the matter of bail, but a removal of the necessity of bail wherever possible, and a relaxation where such a removal cannot be accomplished.

A step forward was made in the provision for cash bail in G.C., Section 1579–20. The tendency of cash bail to drive out the professional bondsmen to some extent is apparent. Another excellent provision is Rule 10, of the criminal branch of the Municipal Court, providing for the release of a defendant upon a personal bond without surety, where the offense charged is a misdemeanor punishable by fine only or a violation of a city ordinance. This rule should be extended to cover other minor infractions of the law which may be punishable by short terms of imprisonment. From what can be learned, however, the administration of this rule has not been wholly successful. The clerks in charge have established a practice of requiring someone to "vouch" for the defendant before releasing him on personal recognizance. This has apparently revived the opportunity for the professional bondsman and the runner, who are active on the trail of arrested persons in order to get them out on a bond without sureties. Rule 10 requires that a defendant, in order to be released on a personal bond, must have had a known place of

residence within the city of Cleveland within six months next preceding his arrest. It should be an easy matter for the clerk's office to establish this fact by the testimony of a neighbor, without requiring anyone to "vouch" for the defendant. At any rate, professional bondsmen and runners should not be accepted, for it is against the spirit of the rule to retain the hold which these parasites have on the petty offenders. How far the enforcement of the rule has drifted from its original purpose may be gathered from the fact that persons charged with vagrancy are sometimes released on personal recognizance, although the very nature of the charge would preclude a known residence for six months and the police blotter shows an entry of "no home."

The establishment of the office of bail bond commissioner in the spring of 1921, followed by the appointment of John J. Busher to that position, should assure an improved operation of this rule. The matter should be worked out in conference between the Chief Justice, the bail bond commissioner, and the chief clerk.

A most beneficial step would be the establishment in petty offenses of beginning process by means of a summons instead of a warrant. It is absurd that known residents of Cleveland should be arrested for violation of traffic and other ordinances and for misdemeanors not serious in their nature. This not only provides opportunity for the professional bondsman and imposes unnecessary hardship upon the accused, but also involves an enormous waste of time by members of the police force, the clerk's office, and the jail attendants. In such cases it should be sufficient, if the policeman handed the accused a summons to appear in court upon a certain day. The summons has replaced the warrant in many other cities.[1] In Detroit it has an extensive use and has proved to be a most successful labor-saving device. In that city a warrant is not issued unless the accused fails to respond not only to the original summons, but to an alias summons issued on the day of his non-appearance in court. In Cleveland an informal summons has already been established in the police prosecutor's office. In certain classes of cases, notably neighborhood quarrels and the like, the police prosecutor summons the party into his office in an endeavor to straighten out the dif-

[1] This is also true in England. "It is considered very improper to issue a warrant for the arrest of a person whose attendance can be secured by summons. In a recent trial at the Old Bailey, where a shopkeeper was on trial for receiving stolen property, it appeared that he had been arrested upon a warrant. The judge inquired particularly why a warrant had been issued, and then stated that a summons would have been sufficient."—*Criminal Procedure in England*, Lawson and Keeder, Massachusetts Law Quarterly, Volume 5, Number 3.

ficulty without the intervention of the court. In theory, at least, this informal procedure is a considerable step forward, but it is obviously vulnerable to abuse and does not go far enough. The summons should not be a discretionary matter with the prosecutor, but should be made the normal mode of beginning of judicial process in certain classes of cases.

There will always remain, however, a residue of cases in which a bail bond with sureties is necessary. The number of such cases may be considerably reduced by the prompt compulsory trial of cases and by the erection of a jail with decent and adequate facilities.

These steps should reduce to a minimum the number of cases in which a professional bondsman may hope to make a profit. By eliminating the opportunity for such business, those who are now engaged in it will seek a living elsewhere. So far as it may be possible to eliminate the professional bondsman, his business should be regulated like that of the "loan sharks" in many jurisdictions.

The Clerk's Office

In this section is discussed only that part of the clerk's office which handles the records for the criminal division. This office is in the Police Court Building, and is altogether inadequate for records, files, or human beings working therein.

The Chief Clerk, Peter J. Henry, devotes most of his time and attention to this office rather than the civil branch.[1] He is well intentioned, quick in human sympathy, and his popularity with his employees does much for the *esprit de corps* of the staff. The first assistant, James Cantillon, is an earnest, hard-working man, who was unfailing in his patient coöperation with the survey. Like all those who have known only one way of doing things for a long time, both are inclined to be somewhat hostile to suggested innovations. To one acquainted with the lack of physical facilities and the antiquated method of record keeping which prevails, it is a constant source of wonder that the system works at all, however badly.

The method has apparently been inherited from the old Police Court, and is not in any sense adequate for the present needs.[2] A record system should accomplish three things: first, enable the clerks and the judges to prepare and follow each day's business; second, leave an accurate,

[1] Contrary to the practice of ex-Chief Justice McGannon, who apparently neglected the criminal branch almost entirely.

[2] In 1912, when the Municipal Court succeeded the Police Court, the total number of cases was 7,788. In 1920 the number was 26,088, an increase of 235 per cent.

easily accessible record of what has happened in each case to date; third, automatically build up statistics which the Chief Justice and the public ought to know as an authoritative basis for appraisal of the courts' work and the basis of its continuous improvement.

Under the system in use the clerks can make up a day's docket fairly well, but there is no adequate way of following the day's business and there is complete failure to secure the second and third objects.

The principal record kept is the "Execution Docket," which is not a docket and has nothing to do with executions. Two sets of records are used, one for "city cases" and one for "State cases." These books are, in fact, journals of the court's business, and the entries for each day are copied therein from penciled notations on the original papers. Thus a case may appear on 10 different pages, if continued nine times, the cross-references to continued cases being forward only and not back, so that while it is possible to trace the history of most cases forward from an entry on a given day, it is not possible, in this book, to trace it back to origin. Even to run it forward means passing the eye over many entries of other cases until the name sought is located, and often the name is spelled differently in different places. Sometimes trace of the case is lost because it was advanced for trial before the continuance date, or the defendant did not appear on the day set, or the clerk made an error in copying the date to which the case was continued. A case is not given a file number until it is disposed of, and if brought up for further disposition gets a second and even a third number. At least seven times as long is required to get the history of a case from this record as would be the case if all the steps were entered in one place, under file number and name. Moreover, since no number is given until the case is finished, it is difficult to ascertain from this record which of several cases pending against the same defendant is being considered. On disposition, many cases are often grouped and given the same file number.

Pending cases are indexed by cards filed alphabetically, so that it is possible to consult the card, ascertain the date set for trial, and extract the original papers from a box containing all cases set for trial on the particular date.

The only approach to a history of the case is found on the file papers themselves, where the plea is entered, with the continuance date, the final disposition, and the name of the judge making final disposition. Nowhere is there a record of the attorney who appeared, or the prosecutor in charge, or the judge in any preliminary stage. As the notes are in pencil, it is not unusual to find an entry cancelled or erased and a new disposition written above the old.

To locate the case of John Stewart it would be necessary to perform the following acts, which might be profitably contrasted with the process of finding the history of a sales order in any modern mercantile business. A beginning is made by consulting an index book where the names are entered alphabetically according to the first letter only, so that one must go through a long list of names beginning with the letter "S". If the name is finally found (and the index has some omissions), the reference is to a folio page of "Execution Docket." If there are several cases of the same name, it is necessary to know the approximate date or else employ a process of elimination. With the folio page one finds an entry relating to John Stewart. It is then necessary to follow the entry forward through all the continuances, trying to pick the name out of many others on the dates given. Finally an entry is reached which disposes of the case, and unless a motion in mitigation is made, with further continuances, the case receives a number, usually in combination with other cases.[1] At the end of each day's cases in the "Docket" the names of both judges are stamped, so that it is not possible from this record to ascertain the judge who disposed of the case.

With the number of the case one goes to the files, which are kept numerically.[2] The penciled notations in the file will then tell the dates of the warrant and plea, continuances and disposition, and the name of the judge disposing of the case is stamped on the margin. If one wishes to know before whom John Stewart was originally arraigned, or before whom a new trial was held, or if one has so many cases that it is impractical to hunt through the original files, then one consults the "Judge's Docket," which is a journal of each day's work kept in two series of books, one for Room 1 and the other for Room 2. The names of judges regularly sitting in these rooms do not ordinarily appear in the "Judge's Docket," so that it is necessary to know the handwriting of each judge to be certain as to identity. This procedure for studying cases in this court is naturally complicated further by occasional errors inevitable in a system of this kind, and by some cases with unusual features, which do not fit comfortably into it.[3] Moreover, the information when obtained

[1] If bail was forfeited, the case is not given a number and is not filed with the other cases. When the forfeiture is set aside, the clerk usually remembers to go back to the forfeiture entry and note the new folio page.

[2] On account of lack of room, files more than three years old are stored in the loft under a thick layer of dust.

[3] To obtain a reliable history of cases of liquor violation appearing in the "Execution Docket" for January, 1921, only, required many days, when a ledger system of keeping records would have yielded the information in as many hours.

is incomplete. The only record books which are at all adequate are the bail forfeiture book, showing the history of such forfeitures,—exclusive of the question whether they have been collected, which is the work of the prosecuting attorney,—and a little volume giving the dates when cases are bound over for the grand jury, and the dates when transcripts are made out in such cases.

The objection offered to maintaining a ledger of cases instead of a day-book—"Execution Docket"—is that it would involve more work and more books. The former objection may be doubted because the present method involves writing the name and charge in each entry, even for continuances, whereas a ledger would show this information once and for all. Moreover, if a difference in record keeping were made between felonies, misdemeanors, and relatively trivial ordinance violations, much labor might be saved, especially if advantage were taken of modern bookkeeping devices.

We regard the question of record keeping as one of first importance. The activities of police court hangers-on are to a large extent dependent upon the assurance that they will leave no tracks behind them, and the watchful interest of the press and the public is baffled into inaction by obstacles which make vigilance too difficult. Moreover, the failure of the system to meet modern needs makes for informal action on the part of some of the judges, and informality in the court breeds suspicion and disrespect.

Recommendations

Other questions relating to the Municipal Court will be discussed under specific headings of a general nature. If the Municipal Court is retained as an institution,[1] the following recommendations are made at this time:

1. Adequate court-house and jail, pending the securing of which the present building should have all alterations necessary to make conditions tolerable, and to remove the sordid aspect of the surroundings.
2. A few physical devices for keeping the crowds in the court-room away from the judge's bench.
3. Increased formality in the court-room and strict maintenance of decorum.
4. A division of the cases into sessions according to their nature and the requirements of decency.
5. Orderly handling of the list, together with an established policy as to transferring cases from one session to another.
6. A stricter rule as to continuances, enforced absolutely.

[1] Its amalgamation with the Common Pleas Court has already been recommended, p. 18, *supra*.

7. Abolition of the "motion in mitigation."

8. The registering, before being heard, of every attorney who appears for a defendant.

9. Extension of the judge's term on the criminal division from three months to six months or a year, discretion remaining in the Chief Justice to alter such terms.

10. Conferences before each swinging of terms between the judges going out, the judges going in, and the Chief Justice, to determine policies in handling cases so as to avoid injustice resulting from the whims or political exigencies of judges, and to promulgate, alter, and secure enforcement of court rules.

11. Close coöperation between the Chief Justice, the clerk, and the police in ridding the court-room and corridors of "runners" and their kind.

12. Formation of a permanent committee of the Bar Association to assist the Chief Justice in cleaning out and keeping out the "shysters" and their followers, this committee to designate as associate members certain probation officers and representatives of social agencies actually working in the police court.

13. Legislation giving the judges summary power to award damages to any defendant in the court, equal to twice the amount paid by such defendant to any runner or lawyer, upon solicitation or upon any representation as to influence with any judge or other public official.[1]

14. A statute or ordinance fixing the charges of professional bondsmen, scaled according to the security given such bondsmen, and clothing the judges with summary power to award damages equal to twice the amount paid in violation of such statute or ordinance. The bondsman should be required to file his affidavit with the bond as to the fee and securities received.

15. Blanket permission to any defendant *pro se*, or any private attorney representing such defendant, to conduct prosecution for any alleged violations of any statutes or ordinances intended to regulate the business and practice of the court. It would help the situation greatly if the Legal Aid Society undertook to enforce penalties for these violations.

16. Extension and closer supervision of the rule allowing for personal recognizances.

17. The formal beginning of process in minor offenses by means of a court summons.

18. The establishment of an entirely new filing system in the criminal branch of the Municipal Court.

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[1] The Suspicious Persons ordinance covers soliciting, but it is not directly in the interest of anyone to see that it is enforced.

CHAPTER VI

THE COMMON PLEAS COURT

History and Jurisdiction

THE center of the judicial system is the Common Pleas Court, established in 1788 by an Act for the Government of the Northwest Territory. The Constitution of 1802 continued the Common Pleas Court, dividing the State into three circuits, each circuit to have a president and not less than two associate judges. The judges were appointed by the general assembly for a seven years' term. Today, after numerous changes, there are 12 judges in Cuyahoga County alone holding office for six years, nominated in direct primary or by petition and elected on a non-partisan ballot. The salary is $8,000 per annum.

This court has original jurisdiction of all felonies, upon indictment by a grand jury, and other offenses where the exclusive jurisdiction is not vested in an inferior court. It, therefore, disposes of all the serious cases and most of the misdemeanors from the country districts of the county.

At the present time four Common Pleas judges sit regularly in the criminal division, although only a few years ago two judges, or even one judge, were adequate for the entire volume of criminal business. The figures cited in Chapter I show that the necessity for this increase lies not only in the increased number of cases, but in the tendency to dispose of cases by trial rather than by plea of the defendant.

Physical Conditions

Physically, the arrangements are a handicap to efficiency. Two court-rooms, the office of the clerk of the criminal division, and the criminal assignment commissioner's room are in the old county court-house on Public Square, but the prosecutor's office is in another building, and two sessions are usually held in the new court-house on the lake front. Because the court is thus scattered through three buildings, much time is lost, especially in getting witnesses and jurors from one court-house to another. Although the criminal clerk's office is in the old court-house, many journal entries, court orders, etc., are made up in the main office

of the clerk of courts in the new building, so that the records cannot be kept in one place, and often precious time is lost in transmitting important court entries and orders. The two rooms in the old court-house are dingy, but large enough. In one of the rooms there are chairs for spectators, but the other has only a bare space, railed off. All of the rooms in the new court-house are commodious and handsomely appointed. Only a few chairs, however, are provided for spectators.

Decorum

The decorum is a considerable improvement over the Municipal Court, but not what it should be, considering the fact that each room has not only a clerk, but a bailiff whose chief business it is to maintain order.[1] The judges themselves, on the whole, do not seem to mind an atmosphere of unrest. In cases of public interest the packing of spectators behind the rail reminds one of the New York subway in rush hours. Confusion is inevitable. Chairs or benches should be provided, and no spectators admitted when the seating capacity of the room is exhausted.

Formalities, the symbols of dignity, which are familiar in an eastern court-room, are lacking. The judges wear no gowns; recesses are taken by the judges simply by getting up and leaving the bench; their return is unheralded by the court bailiff. Smoking in the court-room during a recess is not unusual. An air of familiarity is noticeable among the judges, and between them, the lawyers, and the court attendants. Although it is, of course, an exaggeration to say, as did the late Judge Foran, that "the courts are run like bar-rooms," it is perhaps true that the court-room, in dignity of atmosphere, does not rise above a salesman's display room in a hotel.[2]

Terms of the Court

At the present time the criminal division is active for only three terms during the year, totaling ten months. There is no court during July and August, in consequence of which many persons are confined over the summer awaiting action of the grand jury, and the September

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[1] The county supports a bailiff for each of the 12 judges at a salary of $1,820 per annum, and the total annual expenditure of the bailiff's department is $52,000. It is a question whether this expense could not be greatly reduced by the establishment of messenger service from the assignment room, and the use of guards only when the number of spectators warrants it.

[2] It should be said that the decorum varies somewhat according to the judges on the bench, and that the conduct of civil causes is largely free from the atmosphere of confusion and informality surrounding many criminal trials.

term is thereby congested. From 1912 to 1918 inclusive there was a summer term, but this was abandoned in 1919, although at that time criminal cases were increasing greatly. It has recently been suggested by one of the judges that the April term be extended to include July. Owing to the fact that the civil business of the court is practically suspended during the summer, at least one session could be maintained, on the criminal side, with no hardship on the judges.

Lack of an Executive Head

This court disposes of more than 3,000 criminal cases and 10,000 civil actions a year. In addition to the 12 judges, it has a varying supervisory control over the clerk's office, the two assignment commissioners' offices, the jury commissioners, the jury and grand jury, bailiff's office, and, including the judges, comprises a salary budget of over $375,000 per year. This great enterprise, organized for the business of administering justice, is without any executive head whatsoever.

General Code, Sec. 1558, confers the power of making rules and regulations and assigning business upon the "judges of the Common Pleas Court." The judges hold occasional meetings to discuss pending matters, and by a process of rotation each judge becomes in turn presiding judge, or presiding judge of the criminal division. A bill was introduced at the last session of the legislature creating a permanent Chief Justice, but was defeated because of a rider providing for three additional judges. It cannot be said that the legislature was unwise in refusing to pass the bill in that form. Unless a real executive head to the organization has been appointed to study its needs and guide its administration with authority, the question of how many, if any, additional judges are needed cannot be decided intelligently.

"Loafing Judges"

Much is heard among Cleveland lawyers of the "laziness" of certain of the judges. Recently a judge of the Court of Appeals stirred up a hornet's nest by declaring that "half of the judges are loafing." Although such blanket accusations are necessarily unjust to many hard-working judges, and create the impression that the best judge is the one who sits longest in his room,[1] there is undoubtedly much justification for

[1] Not only do many judges do their hardest work off the bench, but some of the best judges require a certain amount of leisure. Nevertheless, a judge who is late, even habitually so, in his room is a drag on the administration of justice. He causes witnesses to chafe and disappear and lawyers and clients to lose time, as well as respect, for the courts.

the feeling that business could be handled more expeditiously. No permanent improvement will be effected by the humiliating procedure of timing the judges, as has been done by the press, on occasions. What is needed is not for the judges to punch a time-clock, but a high professional atmosphere with an executive head allocating the work and watching its progress.

Some evidence of the advantage of proper organization under a Chief Justice may be gathered from the experience of the Municipal Court, which has had an administrative Chief Justice from its inception. This evidence is not as strong as it might be, because Judge William H. McGannon, for nine years the head of the court, was by no means an ideal Chief Justice. Now that the judge has been compelled to resign, there is a tendency on the part of some to exaggerate his shortcomings while in office. The history of the criminal branch of this court shows a headship lacking vision and constructive ability, and failing utterly in dignity. Nevertheless, Judge McGannon was a "hustler" and kept his associates at work.

On May 7, 1920, occurred the Kagy murder. Aside from the question of his innocence or guilt, this event threatened the judge with loss of reputation by reason of his close connection with the affair, his notorious associates, and the impending exposure of his private life. It is small wonder that from then Judge McGannon did not devote himself to his work with the same zeal as before. On November 26, 1920, he was indicted, and his fight for exoneration and liberty continued practically until his resignation in March, 1921. During this period he prepared for and faced two extended murder trials. It was not only mentally but physically impossible for the judge to devote much time to his duties as Chief Justice. One would expect the trial list to become clogged after May 7, 1920, and jammed after November, 1920. This is exactly what happened.

Diagram 7 shows the number of civil cases filed each month compared with the number of civil cases awaiting trial.[1] In each group the cases on the conciliation docket are omitted. It is to be observed that until June, 1920, the list followed roughly the number of cases filed by from one to two months. Note the unusual rise of the list after the Kagy

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[1] An effort was made to secure the monthly record of civil dispositions for 1920 and the first three months of 1921, but the statistical clerk for the court could not supply the figures from which such a calculation could be made. The figures used were obtained through the courtesy of Frank J. Murphy, clerk of the civil branch, and the office of Charles L. Kaps, assignment clerk.

murder, not related to the fluctuation in the number of cases filed, and the precipitate movement after November, 1920.

For purposes of comparison the civil list of the Common Pleas Court and cases filed is also charted (Diagram 8). The state of the Common Pleas list could be obtained only as of the beginning of each term, and not by months, so that the terms only are charted. The elimination of monthly fluctuations makes the Common Pleas list seem to follow the

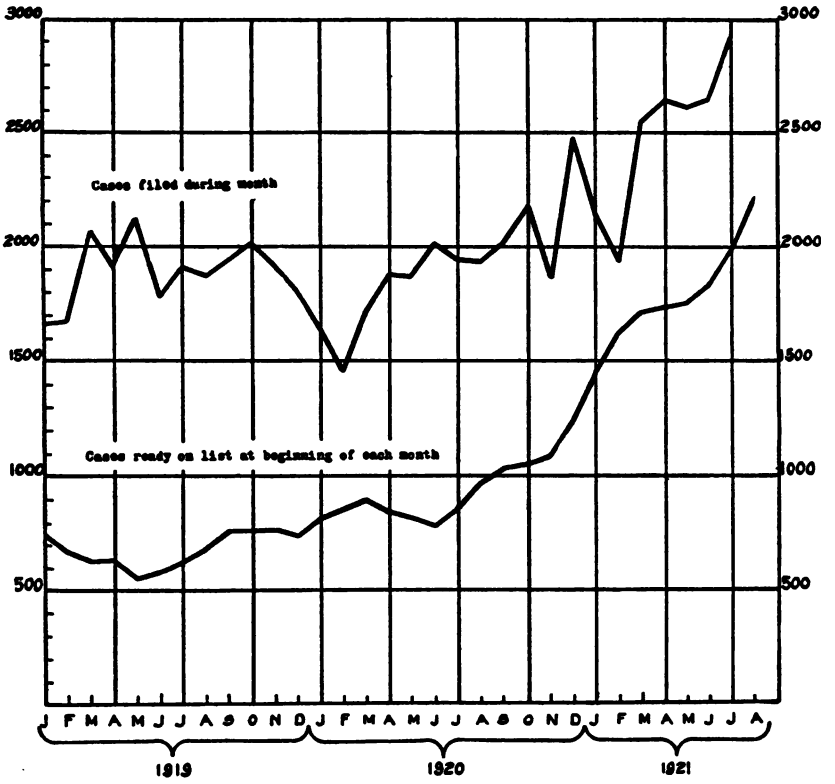

Diagram 7.—Cases ready on list compared with cases filed, Municipal Court

cases filed more closely than in the Municipal Court. It is to be observed that despite the steady increase in the number of cases, the list shows no such precipitate break as in the lower court. The higher level in the spring of 1921 is attributed partly to the assignment of more judges to the criminal division.

A correct record of the hours of attendance by the judges might also afford instructive comparisons on this point. Such a record is kept by

the bailiffs of the judges, but considerable doubt attaches to their accuracy because of the fact that Judge McGannon is recorded as attending his court for *full* months during December, January, and February, 1920–1921, when he was actually preparing for and was bodily present at two long trials involving his own liberty. Accepting the figures as they

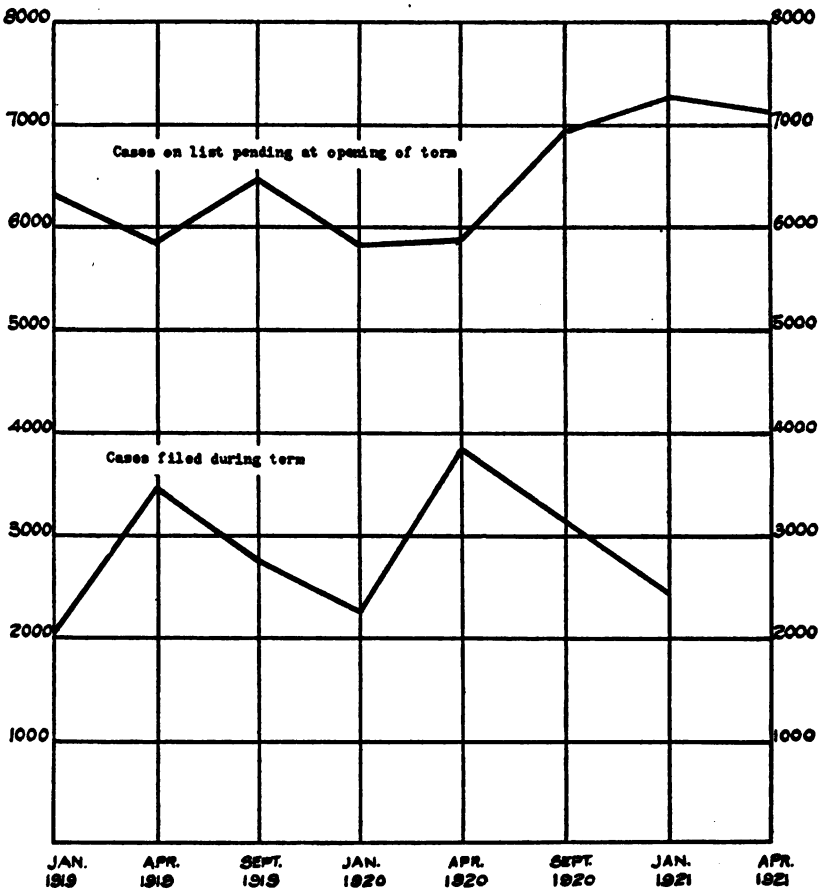

Diagram 8.—Cases ready on list compared with cases filed, Common Pleas Court

stand, however, without allowing for any tendency on the part of bailiffs to give their judges the benefit, even when there is no doubt, the record shows a substantial deficit of judicial hours worked for the months of September, October, November, December, January, and February of 1920–1921 as compared with similar preceding periods. Beginning with

1917–1918, when the records for 10 judges are first available, the figures in hours are:

September–March[1] *1917–18*	*September–March*[1] *1918–19*	*September–March*[1] *1919–20*	*September–March*[1] *1920–21*
7,638 hours	7,533 hours	7,767 hours	7,338 hours

The hours of attendance from 1920–21 are the lowest in the period, despite the fact that the number of cases has been rapidly increasing during this time. Compared with the next preceding year there is a falling off of 439 hours, equivalent to nearly a week and a half per judge. There is little doubt that a more accurate record would disclose a greater deficit.

Fluctuating Policies

The custom of rotating judges in the positions of presiding justice of the civil and criminal divisions of the Common Pleas Court necessarily means a fluctuating policy with regard to the promulgation and enforcement of court rules and practice. This has become of more importance since the establishment of an assignment commissioner in the criminal division in February, 1919. Before that time the lists were in the hands of the prosecutor's office, and any judge in the criminal division who happened to be approached disposed of pleas of guilty and motions to "nolle." In order to prevent "angling" for a particular judge, the Assignment Commissioner now sends such pleas and motions, when advised beforehand, to the presiding judge. This means that the policy in such matters varies with the rotating judges. There is also a great difference among judges in their supervision over the system of selecting petit and grand juries. Perhaps the greatest weakness of continually changing the directing head is seen in the enforcement of court rules; for example, Rule 21, relating to continuances for absent witnesses. The policy regarding "passing" cases (*i. e.*, putting them over for hearing at a later date) has also varied. This is of considerable importance because one of the first objects of a skilled criminal lawyer is to get his case "passed" as often as possible, in the hope of disgusting the State's witnesses and wearing out the interest of the police and prosecutor. In the September term, 1920, Judge Bernon, then presiding judge of the criminal division, stiffened up in the matter of "passing," and in the January term, 1921, Judge Allen asked for an affidavit before "passing" a case. The attorneys, however, then presented affidavits from their clients, and in the April term, when Judge Allen became presiding judge, she issued an order requiring an affidavit of due diligence by the attorney and the presence of the defendant in court before passing any case.

[1] The summer months are excluded because of the vacation period.

The seriousness of laxity in passing cases is well known to everyone connected with the courts. Statistically, there seems to be a direct correlation between the length of time cases have been pending and the mode of disposition. Considering all of the criminal cases begun in 1919, we find the average time per case for different classes of disposition to be as in Table 17.

TABLE 17.—AVERAGE TIME PER CASE BY CLASSES OF DISPOSITION

Disposition	Average number days, arrest to disposition		Average number days, indictment to disposition	
	From inferior courts[1]	Original indictments	From inferior courts[1]	Original indictments
Guilty on first plea	26.1	16.4	9.8	49.4
Change of plea to guilty	62.5	26.2	42.0	44.9
Change to plea guilty lesser offense	65.6	37.7	42.2	53.2
Guilty of felony by jury	71.7	74.6	52.8	113.8
Not guilty of felony by jury	83.8	55.6	54.7	62.3
"Nolled" because of defendant's sentence or imprisonment	84.6	44.0	56.7	75.6
Dismissed or discharged on motion or demurrer	106.0	63.5	58.7	65.7
"Nolled" on all counts, no reason assigned	99.8	124.6	75.5	134.5
"Nolled" after conviction or disagreement	181.4	..	163.7	..
Dismissed, want of prosecution	215.0	293.3	245.0	298.3
No bill by grand jury	29.3	..	..	..
Arrest to true bill	24.4	..	..	..

These figures need little comment, since they indicate clearly the need of a sustained policy of firmness in the matter of passing. Under the present system of rotation this will never be obtained.

Inability to Use Personnel to Best Advantage

Another result of rotating is to make impossible using the abilities of the particular judges to the greatest advantage. The success of any business enterprise requires that it use its personnel in such a way as to employ the abilities thereof to the utmost and to minimize its weaknesses. The administration of justice is no exception. On the civil side, a judge who may do fairly well in tort cases or simple contract, may be beyond

[1] The column for cases coming from inferior courts is the more reliable because based upon approximately 10 times as many cases as the original indictments.

his depth in equity or in disposing of motions. The criminal side has its own requirements. It needs not so much able jurists as men of common sense and firmness, known to be unapproachable by lawyers, prosecutors, or politicians, and inspiring respect that should border on awe.

A judge may be inadequate on the civil side, and yet make a competent criminal judge. Conversely, a judge gifted in theoretical knowledge of the law may be a poor criminal judge, because of his tendency to see abstract theories and not problems of human character.

Tables 18 and 19, based upon cases begun in 1919, show how widely some of the judges vary in performance of duties on the criminal bench. Only judges disposing of at least 100 cases are included, which accounts for the omission of certain judges.

In order to interpret the figures in Tables 18 and 19 more easily, secondary tables, given in Table 20, will be helpful. These secondary tables show how the judges rank by dispositions of cases tried by them. A summary of this table is given in Table 21.

It will be noticed in Part I of Table 20 that Judge Levine leads easily in the number of cases originally pleading guilty, and that he still leads the list in Part II, followed by Judge F. E. Stevens and Judge Cull. A partial explanation of the readiness to plead guilty before these judges is seen in Part V, where the same two men are at the top of the list and Judge Cull is a close fourth. It will be noticed that Judges F. E. Stevens, Pearson, Kennedy, and Phillips lead among those accepting a plea of guilty to a lesser charge. This should be compared with Part VI, which shows the leniency of the judges toward misdemeanors, reflected in a combination of fines only, plus suspended workhouse sentences. Except Judges Levine and Cull, who led on original pleas of guilty, the first four in this list correspond closely with the first four in Part III.

In Part IV of Table 20, cases "nolled," only those cases "nolled" on all counts with no explanation are included. In this list Judge Kennedy leads as widely as Judge Levine in Part I. In February, 1920, Judge Kennedy allowed a "blanket nolle," which included over 50 cases begun in 1919. A large percentage of these cases, however, are not included here because an explanation was given, and many of them would have been "nolled" in due course even had there been no "blanket nolle." It is safe to say that Judge Kennedy would still head the list after allowing for the "blanket nolle."[1]

[1] Presiding judges during the term in which most of the 1919 cases were disposed of were Judges Foran, Stevens, Powell, Kennedy. One would naturally expect these judges to lead in pleas of guilty, changes of pleas, and "nolles." Judge F. E. Stevens alone is high in all of these dispositions, however.

TABLE 18.—DISPOSITION OF CASES CLASSIFIED BY JUDGES HEARING THEM [1]

	All cases	All known judges	Baer	Cull	Foran	Kennedy	Levine	Pearson	Phillips	Powell	Stevens
	Number	Number	Number	Number	Number	Number	Number	Number	Number	Number	Number
1. Total disposed of in Common Pleas Court	2,539	2,340	189	426	141	297	142	104	163	345	412
2. On plea of defendant	1,215	1,209	62	249	77	89	113	45	48	185	277
3. Not on plea of defendant	1,324	1,131	127	177	64	208	29	59	115	160	135
4. Subdivision of 2:											
a. Original plea guilty	428	426	1	134	42	6	81	2	6	56	94
b. Original plea guilty lesser offense	22	21	..	3	1	..	2	..	..	3	12
c. Original plea not guilty changed to guilty	550	548	42	79	21	54	24	33	26	99	124
d. Original plea not guilty changed to guilty lesser offense	193	192	15	27	12	28	6	10	14	23	44
e. Others	22	22	4	6	1	1	..	..	2	4	3
5. Subdivisions of 3:											
a. "Nolled" for all causes	536	528	28	69	14	166	8	25	40	65	86
b. Not arraigned	57	..	..	..	..	..	..	..	..	..	..
c. Bail forfeited	33	..	..	..	..	..	..	..	..	..	..
d. Dismissed or discharged	31	6	..	..	..	..	..	3	1	..	..
e. Trial, not guilty of felony	215	212	41	37	12	22	10	12	24	36	10
f. Trial, not guilty of misdemeanor	8	8	..	..	..	..	..	..	..	8	..
g. Trial, guilty of felony	293	289	43	53	27	15	6	14	42	38	34
h. Trial, guilty of misdemeanor	74	74	14	17	8	5	4	4	6	11	3
i. Others	77	14	1	1	2	..	1	1	2	2	2
6. Subdivisions of 5a:											
a. "Nolled" after commitment for insanity	2	2	..	1	..	..	..	..	..	1	..
b. "Nolled" after new trial granted	13	13	1	..	..	1	..	4	1	1	1
c. "Nolled" after jury disagreement	6	4	1	1	..	..	..	..	..	..	1
d. "Nolled" after plea guilty on other counts	6	6	..	6	..	..	..	..	..	..	..
e. "Nolled" after conviction on other counts	5	4	..	3	..	..	..	..	1	..	..
f. "Nolled" after transfer to Juvenile Court	21	21	..	1	..	11	..	..	1	4	2
g. "Nolled" because defendant already sentenced	84	82	1	16	..	26	..	2	2	28	7
h. "Nolled" on all counts	399	396	25	41	14	128	8	19	35	31	75

[1] Only those judges are named who had more than 100 cases.

TABLE 19.—CASES CLASSIFIED BY KINDS OF SENTENCES, SUSPENSION, AND JUDGES HEARING THEM [1]

	All cases	All known judges	Baer	Cull	Foran	Kennedy	Levine	Pearson	Phillips	Powell	Stevens
	Number	Number	Number	Number	Number	Number	Number	Number	Number	Number	Number
All cases	2,539	2,340	189	426	141	297	142	104	163	345	412
No sentence indicated	937	749	70	98	28	187	19	40	65	111	97
All sentences	1,602	1,591	119	328	113	110	123	64	98	234	315
Sentences executed	1,251	1,243	94	245	93	104	85	46	88	195	219
Sentences suspended	351	348	25	83	20	6	38	18	10	39	96
Felony sentences	904	897	73	222	69	39	62	30	62	139	165
Sentences executed	663	658	57	155	58	33	43	17	60	112	97
Sentences suspended	241	239	16	67	11	6	19	13	2	27	68
All misdemeanor sentences	698	694	46	106	44	71	61	34	36	95	150
Sentences executed	588	585	37	90	35	71	42	29	28	83	122
Sentences suspended	110	109	9	16	9	..	19	5	8	12	28
Fines and costs only	297	295	10	49	9	36	38	19	8	31	61
Sentences executed	275	274	9	44	8	36	28	19	8	28	60
Sentences suspended	22	21	1	5	1	..	10	..	..	3	1
Imprisonment only	249	248	13	37	22	9	12	5	16	59	67
Sentences executed	193	192	9	30	20	9	5	4	8	52	48
Sentences suspended	56	56	4	7	2	..	7	1	8	7	19
Fine and imprisonment	152	151	23	20	13	26	11	10	12	5	22
Sentences executed	120	119	19	16	7	26	9	6	12	3	14
Sentences suspended	32	32	4	4	6	..	2	4	..	2	8

[1] Only those judges are named who have had more than 100 cases.

TABLE 20.—RANK OF JUDGES BY PERCENTAGES OF SPECIFIED DISPOSITIONS IN CASES TRIED BY THEM

I Original pleas of guilty		II Total pleas of guilty		III Change of plea to guilty of lesser offense	
	Per cent.		Per cent.		Per cent.
1. Levine	57.1	1. Levine	79.6	1. Stevens	10.7
2. Cull	31.5	2. Stevens	67.3	2. Pearson	9.6
3. Foran	29.8	3. Cull	58.5	3. Kennedy	9.5
4. Stevens	22.8	4. Foran	54.6	4. Phillips	8.6
5. Powell	16.2	5. Powell	53.6	5. Foran	8.5
6. Phillips	3.7	6. Pearson	43.3	6. Baer	7.9
7. Kennedy	2.0	7. Baer	32.8	7. Powell	6.6
8. Pearson	1.9	8. Kennedy	30.0	8. Cull	6.3
9. Baer	0.5	9. Phillips	29.5	9. Levine	4.2

IV Cases "nolled" on all counts		V Suspended sentences, felonies, and misdemeanors		VI Misdemeanors—combination of fines only and suspended workhouse sentences	
	Per cent.		Per cent.		Per cent.
1. Kennedy	43.1	1. Levine	30.8	1. Levine	77.1
2. Phillips	21.5	2. Stevens	30.5	2. Pearson	70.7
3. Pearson	18.3	3. Pearson	28.2	3. Stevens	58.7
4. Stevens	18.3	4. Cull	25.3	4. Cull	56.7
5. Baer	13.2	5. Baer	21.0	5. Kennedy	50.7
6. Foran	9.9	6. Foran	17.7	6. Phillips	44.4
7. Cull	9.6	7. Powell	16.7	7. Powell	42.1
8. Powell	9.0	8. Phillips	10.2	8. Foran	38.6
9. Levine	5.6	9. Kennedy	5.5	9. Baer	39.1

VII

Cases Tried by Jury

	Per cent. all cases	Per cent. found guilty		Per cent. all cases	Per cent. found guilty
1. Baer	52.0	58.3	6. Cull	25.2	65.5
2. Phillips	44.2	66.7	7. Kennedy	14.2	47.9
3. Foran	33.4	74.6	8. Levine	14.1	49.6
4. Pearson	28.8	60.1	9. Stevens	11.4	78.9
5. Powell	26.9	52.8			

It is interesting to note that generally the sequence in Part IV of Table 20 is the inverse of Part II. Also, the first four who lead the "nolles"[1]

[1] It may be indicative of the character of the work required of a presiding justice that Judges Powell, Kennedy, and Stevens were among those trying the smallest percentage of cases. Judge Foran, the remaining judge who presided during this period, had fewer 1919 cases than the others.

lead the changes of "plea to guilty of lesser offense" in Part III, although the order is shifted about, Judges Stevens and Pearson changing places with Judges Kennedy and Phillips.

Judges Baer and Phillips lead easily in the percentage of cases tried, and Judges Kennedy, Levine, and Stevens show the smallest number disposed of by verdict of a jury. The percentage of convictions after trial is also given, but here the basic figures become so small in some instances that conclusions are hardly justified. The results, however, would probably coincide with the opinion of the bar, that a jury before Judges Kennedy or Levine is more apt to bring in a verdict favorable to the defendant than before Judges Stevens or Phillips.

TABLE 21.—SUMMARY OF RANKS OF EACH JUDGE IN THE SEVEN DISPOSITION CLASSES OF TABLE 20

	Original pleas of guilty	Total pleas of guilty	Changed to plea guilty lesser offense	"Nolled"	Sentence suspended	Fines only and sentence to workhouse suspended	Tried by jury
Baer	9	7	6	5	5	9	1
Cull	2	3	8	7	4	4	6
Foran	3	4	5	6	6	8	3
Kennedy	7	8	3	1	9	5	7
Levine	1	1	9	9	1	1	8
Pearson	8	6	2	3	3	2	4
Phillips	6	9	4	2	8	6	2
Powell	5	5	7	8	7	7	5
Stevens	4	2	1	4	2	3	9

Further comment on the characteristics of the judges is rendered unnecessary by the figures themselves. It is sufficient to know that in so far as the group of 1919 cases may be analyzed, there are wide variations among the individual judges. Moreover, there are characteristics which are not portrayable in statistics, but of which a Chief Justice would be cognizant. Judges with *a priori* theories about crime and its treatment, judges too accommodating to the wishes of prosecuting attorneys or professional criminal lawyers, judges with settled bias against different classes of witnesses, judges who try cases for the newspapers, should be, so far as possible, limited in their service on the criminal division.

It would be an unwise procedure, however, to make permanent assignments to the criminal division. Experience has shown that such a practice tends to make the judges "bloodthirsty or mushy." This is the principal weakness in the plan of the Detroit Criminal Court. Nor

should future assignments be announced prematurely, thus encouraging lawyers and even prosecutors to "string it along until so-and-so gets on the bench." A Chief Justice with full power to make assignments could not only select the best adapted material, but also break up any such attempted liason.

Assigned Counsel

In Cleveland assigned counsel play a large part, quantitatively, in the administration of justice. Counsel appointed to defend an indigent person receives $10 for preparation of the case, and $10 per day in court up to $50. A larger sum is allowed in capital cases. In 1920 assigned counsel were paid the sum of $32,500.[1]

There is no fixed policy with respect to appointing counsel. At the opening of the term, lawyers desiring such practice give their cards to the judge. Formerly the prosecuting attorney recommended lawyers, but under Samuel Doerfler an order was issued forbidding this practice. As a rule, very young attorneys or incompetent older men are appointed, because successful lawyers do not seek the business. In important cases the judges seek to appoint abler men, and some eminent lawyers have served on such appointments from a spirit of professional duty. In the usual run of cases, however, the appointing of counsel is not taken very seriously. "It doesn't make much difference," remarks one judge, "the defendants are usually guilty anyway."

It is apparent that such appointments must to some extent become a reward to habitués of the court-room. Among the 1919 cases, exclusive of instances in which more than one counsel appeared, 114 were appointed once, 31 twice, 25 three times, 14 four times, 9 five times, 7 six times, 3 seven times, 2 eight times and 1 nine times. One hundred and seventy appointed lawyers appeared a total of 251 times, compared with 36 who appeared a total of 189 times.

There is an impression in Cleveland that the appointed counsel usually induces his client to plead guilty and pockets his modest fee for the persuasion. This apparently is not true. Considering the 1919 group of cases, 40.7 per cent. of all cases of appointed counsel pleaded guilty, as compared with 41.7 per cent. of cases of privately retained attorneys. Less than 1 per cent. of such cases pleaded guilty on the first plea, as compared with 2.6 per cent. of the retained lawyers, but this may be because the court protected such unrepresented defendants as seemed unwilling

[1] This may be compared with $41,072.76 allowed the prosecutor's office for salaries in the same year. The prosecutor's office is responsible for at least six times as many cases as the assigned counsel, in addition to handling the civil business of the county.

to plead guilty upon the arraignment. In the cases of assigned counsel, 12.7 per cent. were allowed to plead guilty to a lesser offense, as compared with 9.3 per cent. of the private attorneys.

TABLE 22.—CASES CLASSIFIED BY DISPOSITION AND BY COUNSEL APPOINTED, NOT APPOINTED, OR UNKNOWN

Dispositions	All cases	Counsel unknown	Per cent.	Appointed	Per cent.	Not appointed	Per cent.
Total cases	2,539	754	100.0	527	100.0	1,258	100.0
Total pleas of guilty	1,215	474	62.8	216	41.0	525	41.7
Original plea of guilty	428	393	52.1	2	0.4	33	2.6
Original plea of not guilty changed to plea of guilty	550	41	5.4	142	26.9	367	29.2
Original plea of not guilty changed to plea of guilty of misdemeanor	193	8	1.1	68	12.9	117	9.3
Other pleas	44	32	4.2	4	0.8	8	0.6
Total disposed of by trial	590	18	2.4	193	36.6	379	30.1
Guilty of felony after trial	293	11	1.5	118	22.4	164	13.1
Guilty of misdemeanor after trial	74	3	0.4	18	3.4	53	4.2
Not guilty of felony after trial	215	4	0.5	57	10.8	154	12.2
Not guilty of misdemeanor after trial	8	..	..	..	..	8	0.6
"Nolled" on all counts	399	83	11.0	61	11.6	255	20.3
All others	335	179	23.8	57	10.8	99	7.9

Except in the matter of pleas of guilty, however, the retained lawyers show much better results.[1] The assigned lawyers tried out 37 per cent. of all their cases, and acquitted 29 per cent. of all tried; retained counsel tried 30 per cent. of all their cases and acquitted 42 per cent. of all tried. Assigned counsel succeeded in having 11.6 per cent. of all cases "nolled," as compared with 20.3 per cent. of retained counsel. Of those sentenced for felony, assigned counsel secured a "bench parole" for 19 per cent.; retained counsel, for 30 per cent. Of those sentenced for misdemeanor, assigned counsel secured suspended sentence for 12.5 per cent., retained counsel for 14.7 per cent.; assigned counsel secured 14.3 per cent. money fines, as compared with 44.1 per cent. money penalties by the privately retained lawyers.

[1] This is purely on a quantitative basis, without determining—what, of course, could not be ascertained—whether in fact indigent defendants are to a greater extent than paying clients guilty defendants.

Tables 22 and 23 give the basic figures for assigned and retained lawyers. In the first table the cases having no counsel are also given, but they afford no comparable information, as may be seen. Defendants who have no counsel consist chiefly in those who admit guilt or have not been arrested.

TABLE 23.—SENTENCES CLASSIFIED BY EXECUTED AND SUSPENDED SENTENCE AND BY COUNSEL APPOINTED AND NOT APPOINTED

	Counsel appointed		Counsel not appointed	
	Total	Per cent. of whole	Total	Per cent. of whole
Total cases	527	100.0	1,258	100.0
No sentence indicated	170	32.3	507	40.3
Total sentences	357	67.7	751	59.7
Total sentences suspended	60	11.4	170	13.5
Total sentences executed	297	56.3	581	46.2
Total sentenced for felony	246	46.7	377	30.0
Total sentences suspended, felony	47	8.9	115	9.2
Total sentences executed, felony	199	37.8	262	20.8
Total sentenced for misdemeanors	111	21.0	373	29.7
Total sentences misdemeanors suspended	14	2.6	55	4.4
Total sentences misdemeanors executed	97	18.4	318	25.3
Total misdemeanors sentenced to fine only	15	2.8	165	13.1

The question of adequate representation for the indigent defendant or litigant is of considerable importance if democratic government is to succeed. Undoubtedly the free use of the appointing power places the poor defendant in a much more favorable position in the Cuyahoga Common Pleas Court than in many other courts throughout the country. He is not, at least, compelled to sell his last article of value or deprive his family of necessaries in order to obtain what in theory is not the subject of purchase. The service which the state provides for him, however, is evidently inferior, and to some extent goes to crumb-gatherers. For this service the State pays a sum large enough to retain the services of an adequate firm of competent attorneys. The establishment of a Voluntary Defender's office is recommended, under the joint supervision of a committee of the judges and of the Bar Association. No statute would be necessary, the only requisite being sufficient confidence in the organization for the courts to assign cases to it. This matter should receive the careful consideration of the Common Pleas judges and the Bar Association.

Bail Bonds

Owing to the recent establishment of a bail bond commissioner,[1] it is unnecessary to discuss conditions which have hitherto prevailed. From our investigation, however, it may be stated that the professional bondsman has practically no existence in the Common Pleas Court. Past abuse was connected mainly with collecting forfeited bonds, the responsibility for which rests chiefly on the prosecutor and not on the court.

It would be a wholesome practice, however, if the court inquired into a prisoner's previous record before fixing bail in a felony case. The practice of letting professional criminals out on moderate bail and with questionable bondsmen is inviting danger to the community.[2] This has become exceptionally serious where the defendant is out on bail pending a bill of exceptions after conviction, considered in the chapter on appeals.

The worst feature of the bail situation is not that in a few serious cases the defendant jumps bail and his surety is not compelled to pay. Considerably more demoralizing in its effects is the use of bail to secure the defendant's liberty while his lawyer attempts to wear out the State's case by delay. Jail cases are quite properly tried first, so that a defendant on bail starts off with an opening wedge of delay. Under the conditions in which the [redacted]d its rise, the right to bail was of prime im-

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	Total	Per cent. of whole	Total	Per cent. of whole
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The question of adequate representation for the indigent defendant or litigant is of considerable importance if democratic government is to succeed. Undoubtedly the free use of the appointing power places the poor defendant in a much more favorable position in the Cuyahoga Common Pleas Court than in many other courts throughout the country. He is not, at least, compelled to sell his last article of value or deprive his family of necessaries in order to obtain what in theory is not the subject of purchase. The service which the state provides for him, however, is evidently inferior, and to some extent goes to crumb-gatherers. For this service the State pays a sum large enough to retain the services of an adequate firm of competent attorneys. The establishment of a Voluntary Defender's office is recommended, under the joint supervision of a committee of the judges and of the Bar Association. No statute would be necessary, the only requisite being sufficient confidence in the organization for the courts to assign cases to it. This matter should receive the careful consideration of the Common Pleas judges and the Bar Association.

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The worst feature of the bail situation is not that in a few serious cases the defendant jumps bail and his surety is not compelled to pay. Considerably more demoralizing in its effects is the use of bail to secure the defendant's liberty while his lawyer attempts to wear out the State's case by delay. Jail cases are quite properly tried first, so that a defendant on bail starts off with an opening wedge of delay. Under the conditions in which the criminal law had its rise, the right to bail was of prime importance, since months might elapse between arrest and convening of the court. Under the slow-moving Cleveland system bail is still most important because of unnecessary delays incident to it, but the defendants have turned this "shield into a sword." Under a system where the defendant in the usual case would be tried within a week after arrest or information against him, the importance of bail would fade into a trifle. Really to eliminate the abuse of bail, therefore, fundamental changes must be made in the system, to insure the swift movement of the course of justice.

One judge has called attention to a peculiar phase of the bail question —the practice of jailing the prosecuting witness in a robbery or larceny

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[1] G. C., Sec. 13523–1, 13524–1, 13550–1, 13529–1. A feature of the act is that in suits for penalties it takes away from the court all power to render a judgment less than the full amount of the bond, except where the principal has been surrendered or arrested.

[2] A typical case is that of a professional shoplifter who, on December 6, 1919, stole two silk dresses valued at $200 from the May Company, and a Hudson seal coat valued at $525 from the Lindner Company. She was let out on bail totaling $2,000 and jumped it twice, the last time permanently. Suits are still pending against the bondsman. Her associate in the offenses was fined $5.00 in one case and "nolled" on the other. She was represented by a typical political criminal lawyer.

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[2] A typical case is that of a professional shoplifter who, on December 6, 1919, stole two silk dresses valued at $200 from the May Company, and a Hudson seal coat valued at $525 from the Lindner Company. She was let out on bail totaling $2,000 and jumped it twice, the last time permanently. Suits are still pending against the bondsman. Her associate in the offenses was fined $5.00 in one case and "nolled" on the other. She was represented by a typical political criminal lawyer.

Tables 22 and 23 give the basic figures for assigned and retained lawyers. In the first table the cases having no counsel are also given, but they afford no comparable information, as may be seen. Defendants who have no counsel consist chiefly in those who admit guilt or have not been arrested.

TABLE 23.—SENTENCES CLASSIFIED BY EXECUTED AND SUSPENDED SENTENCE AND BY COUNSEL APPOINTED AND NOT APPOINTED

	Counsel appointed		Counsel not appointed	
	Total	Per cent. of whole	Total	Per cent. of whole
Total cases	527	100.0	1,258	100.0
No sentence indicated	170	32.3	507	40.3
Total sentences	357	67.7	751	59.7
Total sentences suspended	60	11.4	170	13.5
Total sentences executed	297	56.3	581	46.2
Total sentenced for felony	246	46.7	377	30.0
Total sentences suspended, felony	47	8.9	115	9.2
Total sentences executed, felony	199	37.8	262	20.8
Total sentenced for misdemeanors	111	21.0	373	29.7
Total sentences misdemeanors suspended	14	2.6	55	4.4
Total sentences misdemeanors executed	97	18.4	318	25.3
Total misdemeanors sentenced to fine only	15	2.8	165	13.1

The question of adequate representation for the indigent defendant or litigant is of considerable importance if democratic government is to succeed. Undoubtedly the free use of the appointing power places the poor defendant in a much more favorable position in the Cuyahoga Common Pleas Court than in many other courts throughout the country. He is not, at least, compelled to sell his last article of value or deprive his family of necessaries in order to obtain what in theory is not the subject of purchase. The service which the state provides for him, however, is evidently inferior, and to some extent goes to crumb-ga therers. For this service the State pays a sum large enough to retain the services of an adequate firm of competent attorneys. The establishment of a Voluntary Defender's office is recommended, under the joint supervision of a committee of the judges and of the Bar Association. No statute would be necessary, the only requisite being sufficient confidence in the organization for the courts to assign cases to it. This matter should receive the careful consideration of the Common Pleas judges and the Bar Association.

Bail Bonds

Owing to the recent establishment of a bail bond commissioner,[1] it is unnecessary to discuss conditions which have hitherto prevailed. From our investigation, however, it may be stated that the professional bondsman has practically no existence in the Common Pleas Court. Past abuse was connected mainly with collecting forfeited bonds, the responsibility for which rests chiefly on the prosecutor and not on the court.

It would be a wholesome practice, however, if the court inquired into a prisoner's previous record before fixing bail in a felony case. The practice of letting professional criminals out on moderate bail and with questionable bondsmen is inviting danger to the community.[2] This has become exceptionally serious where the defendant is out on bail pending a bill of exceptions after conviction, considered in the chapter on appeals.

The worst feature of the bail situation is not that in a few serious cases the defendant jumps bail and his surety is not compelled to pay. Considerably more demoralizing in its effects is the use of bail to secure the defendant's liberty while his lawyer attempts to wear out the State's case by delay. Jail cases are quite properly tried first, so that a defendant on bail starts off with an opening wedge of delay. Under the conditions in which the criminal law had its rise, the right to bail was of prime importance, since months might elapse between arrest and convening of the court. Under the slow-moving Cleveland system bail is still most important because of unnecessary delays incident to it, but the defendants have turned this "shield into a sword." Under a system where the defendant in the usual case would be tried within a week after arrest or information against him, the importance of bail would fade into a trifle. Really to eliminate the abuse of bail, therefore, fundamental changes must be made in the system, to insure the swift movement of the course of justice.

One judge has called attention to a peculiar phase of the bail question —the practice of jailing the prosecuting witness in a robbery or larceny

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case in default of bail. The statute authorizes such detention of important witnesses where adequate bail cannot be furnished. In some cases, no doubt, it is necessary to confine State's witnesses, especially where the witnesses are indifferent or unfriendly. It is ridiculous, however, to confine the complainant in a robbery case. Cases have been called to our attention where the complainants have been in jail for over a month, and where a man robbed of a few dollars was imprisoned 106 days while the robber—subsequently convicted—was at liberty on bail furnished by friends. This is "looking-glass justice." One judge has mitigated the hardship in such cases by directing the assignment commissioner to place them at the head of the trial list. The only real cure, however, is a greater exercise of common sense on the part of the committing magistrate.

The Clerk's Office

The Clerk of Courts, Edmund B. Haserodt,[1] operates the most satisfactory office connected with the administration of criminal justice in Cleveland. Much of the information needed by the survey was obtained from the records in this office or with the assistance of the clerk's courteous staff, notably John J. Busher, chief deputy in the criminal division, and Mrs. Elizabeth Graham, secretary to Mr. Haserodt.

The chief records kept are: (a) A docket in ledger form with a page for each case, opened immediately on receipt of transcript from the inferior court;[2] (b) a journal containing notes of the court's action each day, kept chronologically; (c) daily calendars of the judges from which the other records are made up; (d) a "conviction book," containing ample notes on convictions by terms; (e) a record of indictments; (f) a bail bond record. An alphabetical index is maintained referring to the docket number of the case, and a brief summary is kept in the original file papers.

The most comprehensive record of a case is kept in the docket, to which reference is usually had for information. Since this is the only place where anything like a full history can be obtained, it is suggested that this docket be made complete and include information not strictly within the clerk's jurisdiction. At present only the names of appointed counsel are entered, but the names of all counsel should appear. When-

[1] Mr. Haserodt's term expired August 1. Mr. Busher became bail bond commissioner July 26.

[2] This docket is of the general nature recommended for the criminal branch of the Municipal Court, but much more extensive than is necessary for the latter.

ever the court takes any action, it is suggested that the names of the judge and the prosecutor responsible be also entered in the docket. At present the docket ends with sentence, or other disposition,—unless there are exceptions,—but the history might easily be extended to cover subsequent events, such as a clear notation that the man was received at the workhouse, and when he was paroled therefrom. Where bail is forfeited, a reference might be made to any suits to collect the bail. This, of course, would involve more work, but much time might be saved by eliminating the journal, which seems to be a useless duplication. There should be some simple method devised for following cases in which several defendants are involved, since the process of entering the steps consecutively, regardless of particular defendant, tends to make the record confusing. Also, the appearance of the docket might be much improved by typewriting the entries.

The most serious handicap to efficiency is the division of the office between the two court buildings, thus scattering the records and causing delay and misunderstanding. This is most clearly seen in cases of convictions affirmed by the Court of Appeals, where weeks sometimes pass before a mandate reaches the old court-house. This phase of the work is more fully considered under appeals.

The Clerk of Courts is elected every two years, and it is customary for a new clerk to discharge practically all the employees and engage a new staff. Obviously, the short term and spoils system are bad for the continuous effective administration of this office. The term should be lengthened if the office is not made appointive and a tradition established for retaining efficient employees. At present these employees are not under the civil service, but Mr. Haserodt has attempted to comply with the requirements of the civil service both in selecting employees and in the matter of payroll.

The Assignment Commissioner

Two years ago this office was created to take the management of the list out of the prosecutor's office. Under the capable direction of the assignment clerk, Archie J. Kennel, the office has given considerable satisfaction to those who sponsored the change. The Common Pleas Court has facilities for disposing of criminal cases with surprising promptness, if the practice of "passing" and continuing was properly curbed. The office of Assignment Commissioner may be especially useful in notifying counsel and witnesses, thus saving much of the time ordinarily lost by waiting around the court-house for cases to be reached. Mr. Kennel has devised records which enable him to obtain prompt informa-

tion respecting the judges or attorneys acting in a particular case, and these records were of much assistance in the survey.

Recommendations

The following is a summary of recommendations pertaining to the Common Pleas Court:

1. The establishment of a permanent executive head of the court with a modern court organization.
2. Certain physical changes, particularly the holding of all sessions under one roof; the keeping of all records in one place; facilities for seating spectators, and a rule forbidding any one not a lawyer or court officer to stand while court is in session.
3. The adoption of such formalities as will add to the dignity of the court-room, and the enforcement of due decorum by the court officers.
4. The elimination of the custom of "passing cases" except for urgent reasons.
5. The establishment of a Voluntary Defenders' office under the joint supervision of the judges and the Bar Association.
6. Modification of the custom of jailing prosecuting witnesses.
7. Greater care in allowing bail to professional and habitual criminals.
8. Certain detailed changes in methods of keeping records.

CHAPTER VII

THE COURT OF APPEALS

History and Jurisdiction

THE Court of Appeals, created by constitutional amendment in 1912, inherits through the circuit courts established by the constitutional amendment of 1883, which in turn succeeded the district courts established by the constitution of 1851. These district courts were originally established to relieve pressure on the Supreme Court, and the present Court of Appeals still holds this position. It has no original criminal jurisdiction, but has final appellate jurisdiction in all matters except felony cases and cases of public or general interest. Inasmuch as the Supreme Court cannot be required to pass on the sufficiency of evidence,[1] except where it has original jurisdiction, and in any case must grant leave before a petition in error may be filed,[2] the jurisdiction of the Court of Appeals, even in felony cases, is practically final.[3]

Until recently the appellate procedure in misdemeanor cases in the Municipal Court was first to the Common Pleas Court, thence to the Court of Appeals. A petition in error may now be filed immediately in the Court of Appeals, without the intermediate review by the Common Pleas Court.[4] Another change which ought to expedite appealed cases is the passage of the Boylan Bill in April, 1921, constituting Cuyahoga County as a separate district and forming a new district out of the counties with which it was formerly joined.

The judges of the Court of Appeals, of which there are three for each district, are organized with headquarters at Columbus, make their own rules, and determine what opinions shall be published. The judges of each district make rules to fit local needs, as, for instance, the rule promulgated by Judges Washburn, Vickery, and Ingersoll during 1921,

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[1] G. C., Sec. 13751.

[2] G. C., Sec. 13751.

[3] There is a right of appeal to the Supreme Court where the constitutionality of a statute is involved. G. C., Sec. 13571.

[4] G. C., Sec. 1579–36. See Luthringer v. State, 11 O. App. 294.

automatically advancing criminal cases for hearing.[1] Admirable regulations are the constitutional provision requiring concurrence of all judges of the court to reverse a judgment upon the weight of the evidence,[2] and the statutory provision for appeal by the State to establish a precedent in criminal cases.[3]

The Court of Appeals has a monopoly in Cuyahoga County of the dignity which is proper and necessary to a court. It has escaped the degradation which has pursued the other courts of the county, partly because of the nature of its business and partly because of its ample and impressive physical appointments.

Dispatch of Business

In the dispatch of criminal business the court would probably compare favorably with similar courts in other jurisdictions, although in view of the universal delay in handling appeals this should not be cause for satisfaction. Among all cases begun in the Common Pleas Court in 1919, 39 felony cases were taken to the Court of Appeals on error, averaging seven months and ten days between the filing of the petition in error and the decision of the Appellate Court. The court seems to dispose of cases from inferior criminal courts with more speed, however, since 11 petitions from inferior courts entered in the Common Pleas Court in 1919 were reviewed by the Court of Appeals in the same calendar year as the filing of petitions in that court. Of the seven cases of liquor law violation heard in January, 1921, by the Municipal Court and taken to the Court of Appeals on error, all were disposed of before April 19, 1921. That there must have been severe congestion in the handling of civil cases, however, is evidenced by the passage of the Boylan Bill. It remains to be seen whether this cutting down of geographic jurisdiction will enable the court to expedite felony cases as well.

Results of Appealed Cases

It may be said that the Court of Appeals is hardly a factor in the breakdown of the administration of criminal law. Of the 39 felony cases appealed, 25 resulted in convictions affirmed, six were dismissed by the plaintiffs-in-error or by the court, and seven were reversed or discharged. Among all cases begun in the Common Pleas Court in 1919, less than

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[1] The power to make such a rule is conferred in G. C., Sec. 1523.

[2] Constitution 1912, Article IV.

[3] G. C., Sec. 13764. Of course, a defendant once acquitted may not be tried again regardless of the outcome of the State's petition.

three-tenths of 1 per cent. moved nearer to freedom by virtue of a petition in error, and of all convicted of felony after trial, only 2.4 per cent. succeeded in this way. The chief ground for reversal was that the verdict was against the weight of evidence. All the petitions in the 11 misdemeanor cases resulted in affirmed convictions. Of the seven cases of liquor law violation, the Court of Appeals reversed five for error of the police court judges. Five of these liquor cases had been tried before Judge F. L. Stevens during his campaign against such offenders, and four of these were reversed.

Failure of Clerk's Office to Act Promptly

The Clerk of Courts is the same for the eighth district Court of Appeals as for the Common Pleas Court. This office has already been considered in connection with the latter court. It is, however, in the handling of proceedings on petition in error in the Court of Appeals that the clerk's office is chiefly defective. A comparison of the dockets of the Court of Appeals with those of the Common Pleas Court shows that in the 32 felony convictions affirmed there is an average spread of twenty-four days between the date of the decision as noted in the former record and the date as noted in the latter. In one case the spread was eighty days and in two cases over sixty. This means that several weeks or even months may elapse after the upper court has affirmed conviction before the sheriff receives a capias from the clerk of the criminal branch of the Common Pleas Court. The gap is probably due to the fact that no successful effort has been made to overcome the physical gap between the main office of the clerk on the lake front and the criminal branch on the square. When the Court of Appeals affirms a conviction, the following steps occur: the bailiff of the Court of Appeals takes the opinion to the Clerk of Courts, who makes out the mandate and journalizes the entry; the case is then sent from the mandate clerk to the cost clerk, from the cost clerk to the filing clerk, and from the latter to the clerk of the criminal division, who makes out a capias for the sheriff.

It is obvious that where so many steps and so many persons are involved, delays and errors are apt to occur in conveying to the sheriff official notice of the action of the Court of Appeals. In the case of Rosario Spinello, No. 9211, Common Pleas Court, the mandate was lost entirely and the defendant, whose conviction for manslaughter was affirmed by the Court of Appeals on January 14, 1918, was not arrested by the sheriff until a year later. Mere accident resulted in the discovery that the convicted man was still at liberty. Spinello knew that his conviction had been affirmed, but naturally preferred to remain at liberty on bail pending action of the authorities.

Bail Bonds Pending Error

Not all defendants remain as honestly quiescent as Spinello, however. For instance, among the 39 felony cases mentioned above, there is John Loggio, No. 17336, who was convicted of shooting with intent to wound on October 29, 1919; filed a petition in error, but dismissed the petition on his own motion May 3, 1920. The Common Pleas Court noted this action on July 22 and issued a capias, but in the meantime Loggio had fled to parts unknown. Similarly Meyer Goldberg, No. 17448, convicted of robbery on February 5, 1920, had his conviction affirmed January 10, 1921. The Common Pleas record shows the following: "1–31–21—Judgment of Court of Common Pleas affirmed; 2–25–21—Bond forfeited, capias." Goldberg was still at large when the study was made. A curious case is that of William Allen, No. 15874, whose conviction was set aside by the Court of Appeals, but who jumped his bail despite this fact, probably before the upper court rendered its decision. Allen is still at liberty, although his case would probably be "nolled" if he returned. In two other cases of the same group the last entry is "capias" issued: Anton Kabel, No. 15327, and Joseph McLaughlin, No. 15303. It is probable, however, that these defendants were subsequently apprehended.

In other cases there was apparently an attempt to jump bail, judging by the time necessary to place the defendant in custody after the capias was authorized. In view of the fact that of the 39 cases appealed seven were reversed and at least half of the remainder were in custody pending the proceedings in error, this proportion of actual and attempted bail jumping is quite large.

Other recent cases are Julius Pettianto, No. 18178, convicted of autostealing, whose petition in error was dismissed November 22, 1920, for want of preparation, such action noted by the Common Pleas Court December 8, 1920; bond forfeited and capias issued December 23, 1920; Harry Cohen, No. 14746, convicted of pocketpicking May 6, 1919; conviction affirmed December 24, 1919; noted by Common Pleas Court January 2, 1920; bond forfeited January 14, 1920. In none of the bail forfeiture cases had any money been collected on the bail bonds at the time of this study.

Recommendations

It is for the new Clerk of Courts to solve the problem of organizing his office so that the clerk of the criminal division receives instant notification to issue a capias upon the action of the Court of Appeals in affirming a conviction. So far as possible the records should be kept in one place, and steps between the handing down of the opinion of the

upper court and the order to issue a capias should be eliminated or postponed. Other suggestions have been made, namely, that the defendant must be in court when the Court of Appeals announces its decision, and that the decision shall not be made public until a capias is in the hands of the sheriff.

If some such procedure were adopted, it would no longer be possible for a defendant to wait until his last chance was clearly gone and then have ample time to put his house in order before leaving the State. It would not, however, prevent a defendant from jumping bail before the decision is announced, or from deliberately abusing the appeal process in order to gain time. From the number of petitions dismissed on motion of the plaintiff-in-error, or for lack of preparation, it is obvious that there is such abuse. One notorious automobile thief participated in a most atrocious double murder and payroll robbery while his attorney was considering the advisability of filing a petition in error after conviction for auto-stealing.

A step which would reduce bail jumping and abuse of appeal is the refusal of bail to a defendant after conviction of a crime professional in its nature, like auto-stealing, robbery, pocketpicking, etc. The facts of each case must determine the discretion of the court. Here, however, there is a legal difficulty. G. C., Sec. 13698 (108 O. L. 18, 1919), provides as follows:

"When a person has been convicted of any bailable offense * * * and gives notice in writing to the trial court of his intention to file or apply for leave to file a petition in error, such court * * * *may*, and if such person is not confined in prison *shall*, suspend execution of sentence or judgment for such fixed period as will give the accused time to prepare and file * * * a petition in error, and such suspension shall be upon condition that the accused enter into a recognizance with sureties * * * ."[1]

G. C., Sec. 13700, provides in effect that a defendant already out on bail need file no further recognizance pending proceedings in error. Formerly the question of bail after conviction was discretionary with the court in all cases. The compulsion placed upon the court where the convicted defendant is already at liberty is a mistaken policy, and should be removed at the next session of the legislature.

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[1] The italics are our own.

CHAPTER VIII

SUSPENDED SENTENCES, "NOLLES," AND PLEAS OF GUILTY TO LESSER OFFENSE

WE have already seen that about 20 per cent. of all felony cases are nolle-prossed in the courts, that over 8 per cent. of those indicted are allowed to plead guilty to an offense less serious than the indictment, and that of those convicted, from 10 to 30 per cent. receive suspended sentences. With respect to offenses less than felonies in the Municipal Court, about 7 per cent. are "nolled" and 35 per cent. of those convicted receive suspended sentences. One would suppose that in releasing defendants on such a wholesale scale the court must realize what it is doing.

Yet Justice acting with veiled eyes is never better exemplified than by the judge attempting to handle one of these questions.[1] Obviously, the judge should be in possession of adequate information before he can act with fairness to the defendant or the community, yet under the existing system it may be only by chance that he learns the true situation.

Let us suppose a man convicted of felony and given an indeterminate sentence in the Ohio State Reformatory. Under Sections 13706–13715 of the code the judge may "parole" this defendant if he is a first offender.[2] He is importuned by the defendant's lawyers and besieged by his relatives and friends. Evidence of previous good character is supplied in quantity, and pledges of good behavior are heaped upon the judge. To whom shall the judge turn for a disinterested recital of the true situation?

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[1] The process of suspending sentence and placing the defendant under surveillance is known in most jurisdictions as "probation." The discussion in this chapter extends as well to suspending workhouse sentences as to "paroling" more serious offenders.

[2] "In all prosecutions * * * where the court has power to sentence * * * and it appears that the defendant has never before been imprisoned for crime * * * said court may suspend execution of sentence and place the defendant on probation. * * *"

Sec. 2 excludes certain crimes from the operation of this statute, and Sec. 3 gives the court power to suspend execution of sentence at *any time* in jail or workhouse cases.

Police and Prosecutors not Best Advisers to the Court

Police officers who aided the prosecution, if such can be found, may be helpful, but they know only part of the story, often have a bias, and are not trained to the difficult task of appraising the possible results of treatment outside of an institution. Moreover, police witnesses vary in different cases so that the court must rely on many advisers with many different standards of judgment and varying outlook upon life.

The only other source of information is the prosecuting attorney, who has the advantage of being easily accessible and known to the judge. Here again there is the possibility of bias against the prisoner, often engendered by the heat of a contest, of favoritism because of friendship for the defendant's lawyer, or because of political influence. Even if the prosecutor is wholly impartial, as he often is, he usually knows only those facts necessary to a conviction, and has not burdened his mind with those "imponderables" necessary to the formation of a judgment on the question of probation. Even the previous record of the prisoner, sent by the Bureau of Criminal Identification to the prosecutor's office, containing merely such bald facts as arrests and convictions, rarely reaches the judge, and perhaps is not even known to the particular prosecutor in charge.[1]

Public Clamor Followed

In the old game of "Donkey" the blindfolded player often relies upon the cheers of the onlookers to guide him to the spot where he can pin the animal's tail in its proper place. In like manner the judges, deprived of the opportunity of forming their own judgment upon all the facts, are often prone to follow the clamor of the press and public. When the cry is "thumbs up," paroles issue in abundance, but when it is "thumbs down," both the good and the wicked travel the same road. When Tom L. Johnson was mayor, a generous humanitarianism not adequately guided by science in the handling of offenders began which did not reach its sentimental climax until several years ago. The Chief of Police started to release without trial all first offenders in certain minor crimes, becoming thereby nationally known as "Golden Rule" Kohler.

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[1] Writing to a parole officer under date of December 20, 1920, the prosecutor's office says: "These two boys broke into a confectionery store and helped themselves to about $112 worth of cigars and smoking materials. The court accepted a plea of guilty to petit larceny in the case, hence their sentence to workhouse. There is no previous record against these boys." The "two boys" mentioned were in fact two aliases of the same criminal, whose amazingly long police record is No. 10238, printed on page 11 of this report.

The idea spread from police to judge, from misdemeanor to felony, until, as an editor of one of the Cleveland papers put it, "a lawyer regarded it as a personal insult if a judge sent his client away." Under the Davis régime this false idealism was perverted into good-fellowism, and the damage was done. Cleveland became known as an "easy town," which it certainly was.

Cases "Paroled" in January, 1917

In the January term of 1917, 254 men pleaded guilty or were convicted of felonies and 135 were paroled by the court. It should be remembered that these men were a selected bad lot, since by the decimating processes of the system most of those who had anything in their favor had escaped in the police court, in the grand jury room, in the prosecutor's office, or by pleading guilty to a misdemeanor instead of the original charge of felony. Yet over 53 per cent. of this dangerous group went practically unpunished. For purposes of comparison, a page of the conviction book for this January, 1917, term is reproduced, the word "paroled" appearing in the last column where such action was taken. Note the large number of crimes of a professional nature which were unpunished.[1]

This page should be contrasted with the page reproduced from the conviction book for September term, 1920.

In this term 257 men pleaded guilty or were convicted of felonies, and 30 were paroled, or a little more than 11 per cent. This represents reaction to the "crime wave" and a revolt against "good-fellowism."[2] The contrast is a witness to the effect of public clamor upon the judicial mind, since there probably was about the same proportion of confirmed evildoers and meritorious offenders in the 1917 term as in the 1920 term.

The judge who presided during the 1917 term has declared that 80 per cent. of cases paroled never get into trouble again. Whether or not this is true,[3] it does not justify paroling blindly. A too free use of parole

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[1] "B. & L." means burglary and larceny, "P. P.," pocketpicking, "C. C. W.," carrying concealed weapons; "O. M. V.," operating motor vehicle without consent of owner. The fact that this happens to be the term of any particular judge makes no difference. The record of nearly every judge prior to 1917 would have been similar. The trouble is not so much with any particular judge as with a system which compels him to guess in the dark.

[2] To appreciate the force of this revolt the November, 1920, votes for Republican candidates for President and Governor should be compared.

[3] Detective Koestle, of the Bureau of Criminal Identification, agrees with this estimate.

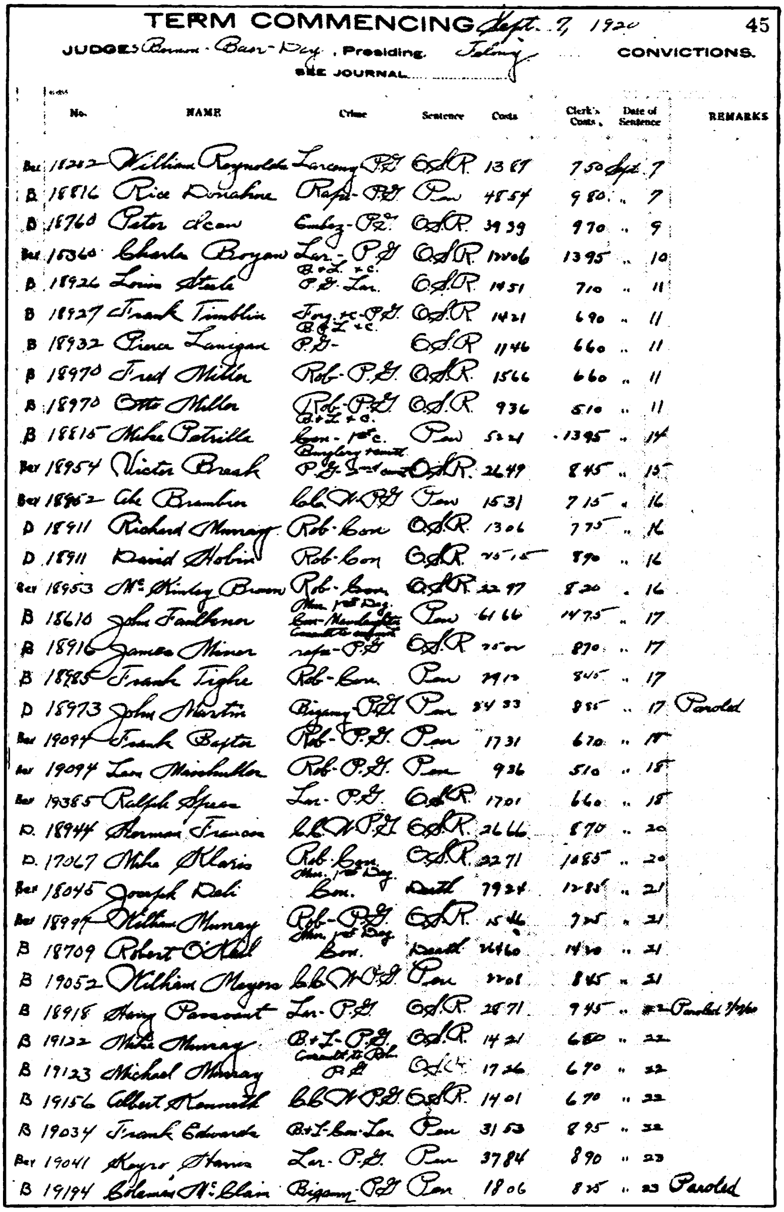
244 TERM COMMENCING January 2nd 1917

JUDGE Willis Vickery Presiding. Felony CONVICTIONS.

SEE JOURNAL

No.	NAME	Crime	Sentence	Costs	Clerk's Costs	Date of Sentence	REMARKS
10072	Edward Williams	Forgery &c. Con.	Pen	28 47	8 90	Jan 17	
10076	Charles Levandowski	B.+L.-P.G.	O.S.R.	16 41	7 45	" 17	Paroled
10093	Wm. Donnelly	Forgery &c. P.G.	O.S.R.	16 71	7 75	" 17	Paroled
9687	Salvatore Scaffacnagu	Manslaughter P.G.	O.S.R.	69 86	12 15	" 18	Paroled
9893	Charles Night	O.M.V. etc. P.G.	O.S.R.	97 44	7 85	" 18	Paroled 1/20/17
9893	Louis Salco	O.M.V. etc. P.G.	O.S.R.	90 91	5 65	" 18	
9104	George Miller	Rob-P.G.	O.S.R.	17 91	8 30	" 18	Paroled
9883	Joe Bessa	Rob-P.G.	O.S.R.	15 61	8 75	" 18	Paroled
10045	John Kennedy	B.+L.-P.G. Burglary	O.S.R.	17 36	8 25	" 19	Paroled
9105	Adolf C. Bozozowski	O.P. by F.P. Con.	Pen	31 50	11 30	" 20	Paroled
9675	Emil Janock	O.M.V. etc. P.G.	O.S.R.	27 90	9 50	" 20	Paroled
9992	Walter Zaremba	Rob-Con	O.S.R.	20 90	8 90	" 20	
10045	Frank Martin	B.+L. Con-Burglary	O.S.R.	18 55	9 20	" 20	Paroled
9902	Effie White	O.P.-Con	W.Ref.	39 50	11 05	" 20	
10125	James Stronck	B.+L.-P.G.	O.S.R.	14 01	6 80	" 20	
10109	Nelson Wright	C.C.W.-P.G.	O.S.R.	14 46	8 10	" 22	Paroled
9564	James Kelley	Rob-P.G.	O.S.R.	13 26	8 05	" 22	Paroled
10130	Bert Addler	Assault to Rob. P.G.	O.S.R.	18 36	6 70	" 22	
10108	Richard Heilun	Lar-P.G.	Pen	16 66	7 45	" 22	Paroled
9134	Henry Fox	O.P.-P.G.	O.S.R.	21 91	8 40	" 22	Paroled
9859	John Samarlano	Perjury P.G.	O.S.R.	18 77	8 65	" 23	Paroled
10123	Michael Higgins	B+L-P.G. Lar	Pen	20 14	9 15	" 23	
10123	Louis Melotte	B+L-P.G. Lar	Pen	10 71	5 55	" 23	
10123	George Goers	B+L-P.G. Lar	Pen	10 71	5 50	" 23	
9990	Carl Cassanek	C.C.W.-P.G.	O.S.R.	16 61	8 40	" 23	Paroled
9860	David Heller	Lar etc. R.A.P. Con-R.A.P.	Pen	27 42	9 90	" 23	Paroled 1/30/17
8648	Eugene C. Irwin	Embez-P.G.	O.S.R.	12 25	7 45	" 23	Paroled
9946	John Pecha	Bigamy-P.G.	O.S.R.	20 49	8 80	" 24	Paroled.
10091	Clarence Parker	Utter F. &c. P.G.	O.S.R.	47 85	9 00	" 24	
10142	Robert Robertson	Rob-P.G.	O.S.R.	27 71	6 70	" 24	
10143	Stanley Peck	B+L-P.G.	O.S.R.	11 86	7 20	" 24	Paroled
10075	Charles Calabrise	B.+L.-P.G.	O.S.R.	26 50	8 95	" 25	Paroled
10015	Joseph Lacigno	B+L-P.G.	Pen	10 71	6 55	" 25	Paroled
10139	Philo Platt	Rob-P.G.	O.S.R.	20 06	7 80	" 26	Paroled
9535	Thomas Curtain	Rob Con.	O.S.R.	37 93	10 60	" 27	Paroled

Page from the conviction book, January, 1917, term of Common Pleas Court, showing the number of paroles



TERM COMMENCING Sept. 7, 1920 45

JUDGES Bonn - Barr - Day, Presiding. Felony CONVICTIONS.

SEE JOURNAL

	No.	NAME	Crime	Sentence	Costs	Clerk's Costs	Date of Sentence	REMARKS
Bar	18282	William Reynolds	Larceny-P.G.	O.S.R.	13 87	7 50	Sept. 7	
B	18816	Rice Donahue	Rape-P.G.	Pen	48 54	9 80	" 7	
B	18760	Peter Dean	Embez-P.G.	O.S.R.	39 39	9 70	" 9	
Bar	18360	Charles Boyan	Lar.-P.G.	O.S.R.	1 06	13 95	" 10	
B	18926	Louis Steele	B & L. &c. P.G. Lar.	O.S.R.	14 51	7 10	" 11	
B	18927	Frank Timblin	Forg. &c. P.G.	O.S.R.	14 21	6 90	" 11	
B	18932	Pierce Lanigan	B & L &c. P.G.	O.S.R.	11 46	6 60	" 11	
B	18970	Fred Miller	Rob-P.G.	O.S.R.	15 66	6 60	" 11	
B	18970	Otto Miller	Rob-P.G.	O.S.R.	9 36	5 10	" 11	
B	18815	Mike Patrilla	B & L &c. Con - 1st c.	Pen	52 21	13 95	" 14	
Bar	18954	Victor Break	Burglary tools P.G. [illegible]	O.S.R.	26 49	8 45	" 15	
Bar	18962	Abe Bramber	C.C.W. P.G.	Pen	15 31	7 15	" 16	
D	18911	Richard Murray	Rob-Con	O.S.R.	13 06	7 75	" 16	
D	18911	David Hobin	Rob-Con	O.S.R.	75 15	8 90	" 16	
Bar	18953	McKinley Brown	Rob-Con.	O.S.R.	22 97	8 20	" 16	
B	18610	John Faulkner	Mur. 1st Deg. Con-Manslaughter	Pen	61 66	14 75	" 17	
B	18916	James Miner	Committed to commit rape-P.G.	O.S.R.	25 00	8 70	" 17	
B	18985	Frank Tighe	Rob-Con.	Pen	79 10	8 45	" 17	
D	18973	John Martin	Bigamy-P.G.	Pen	54 33	8 85	" 17	Paroled
Bar	19094	Frank Baxter	Rob-P.G.	Pen	17 31	6 70	" 18	
Bar	19094	Leo Meinhuller	Rob-P.G.	Pen	9 36	5 10	" 18	
Bar	19385	Ralph Spear	Lar.-P.G.	O.S.R.	17 01	6 60	" 18	
D	18944	Herman Francen	C.C.W. P.G.	O.S.R.	26 66	8 70	" 20	
D	17067	Mike Klaris	Rob-Con.	O.S.R.	22 71	10 85	" 20	
Bar	18045	Joseph Dali	Mur. 1st Deg. Con.	Death	79 24	12 85	" 21	
Bar	18997	William Murray	Rob-P.G.	O.S.R.	15 46	7 25	" 21	
B	18709	Robert O'Neil	Mur. 1st Deg. Con.	Death	14 60	14 30	" 21	
B	19052	William Meyers	C.C.W. P.G.	Pen	22 08	8 45	" 21	
B	18918	Harry Paramount	Lar.-P.G.	O.S.R.	28 71	9 45	" 22	Paroled 1/4/20
B	19122	Mike Murray	B & L-P.G.	O.S.R.	14 21	6 80	" 22	
B	19123	Michael Murray	Assault to Rob. P.G.	O.S.R.	17 26	6 70	" 22	
B	19156	Albert Kenneth	C.C.W. P.G.	O.S.R.	14 01	6 70	" 22	
B	19034	Frank Edwards	B & L-Con-Lar.	Pen	31 53	8 95	" 22	
Bar	19041	Keyro Stamm	Lar.-P.G.	Pen	37 84	8 90	" 23	
B	19194	Coleman McClain	Bigamy-P.G.	Pen	18 06	8 25	" 23	Paroled

Page from the conviction book, September, 1920, term of Common Pleas Court, showing the relatively small number of paroles

certainly encourages others, if not the defendant himself, to "take a chance" where their "pal" got off so lightly.[1]

It should always be remembered that the parole represents leniency to men *proved* guilty and involves no question of punishing innocent men with which it is often sentimentally confused. Every possible precaution should, therefore, be taken to protect the public from the 20 per cent. who admittedly get into trouble again. In a court with proper facilities for obtaining information such a large percentage would not be freed to prey upon the community.

It is not possible to study the history of each individual felon paroled in January, 1917, but even without such a study, from the facts already known to the Bureau of Criminal Identification, it is possible to indicate the loose operation of the "bench parole." Undoubtedly there is much more which has not got into the police records of Cleveland.[2] It should be remembered that the "bench parole" was intended as a helping hand for the erring and not as an additional device to facilitate the escape of crooks. Nevertheless, owing to the absence of any responsible informant, the court has to some extent unintentionally established another loophole.

Of those paroled in January term, 1917, at least eight were then known to the police of Cleveland as having been arrested for or convicted of serious offenses, five having "done time" before, and one having sentence previously suspended. Two of these men actually had cases pending in the Municipal Court at about the same time. One of them, Frank Nolan, was given a suspended sentence under an alias in the lower court just before he was paroled on the more serious charge in the Common Pleas Court. Of these eight men, four have not been arrested in Cleveland since the charge on which they were paroled. The others have since had criminal records, including one notorious robber who finally landed in the penitentiary, and one professional pickpocket who still plies his trade in Cleveland with occasional interruptions by the police.

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[1] One of the judges of the new Detroit court tells of three successive larcenies by different messengers of the Western Union, the first two receiving probation and the third offender being punished severely to stop what seemed to be the beginning of an epidemic.

[2] Not only are many arrests not recorded, especially for minor offenses, but many offenses are committed for which no arrests are made. The late Judge Foran called attention to the fallacy of using the police record only to determine whether the defendant is a "first offender." He may have been a continuous offender for years and have always escaped arrest.

Fifteen others of those paroled have since been known to the police, five of them being returned to the reformatory or penitentiary as parole violators—three for robbery, one for forgery, and one for violation of the automobile law. Of the nine remaining, one was killed while committing a burglary in Cleveland a few months after his parole, six have been arrested in Cleveland for robbery, burglary and larceny, auto-stealing, and violating the automobile law; two have been arrested in other cities for larceny, and one has been located in San Quentin State Prison, where he is serving sentence for bank robbery.

Paroling in the Dark

Admitting that to parole or not to parole is a question often involving the most difficult judgments, and that a low percentage of errors is represented by eight men already known to the police and at least 19 men who continued careers of crime thereafter out of a total of 135, it is a safe assumption that few of these men would have escaped with parole if the judge had been supplied with a thorough, impartial report in each case. The number of professional or hardened criminals is always a low percentage of the total who get into serious trouble, and such men can usually be "spotted" by the time they get before the Common Pleas Court on serious charges, provided the *responsibility for investigating them is placed in one agency and there is no question of ability or integrity.*

It is no answer to the urgent need for such an agency to assume that the matter of the "bench parole" is a question of the ability and conscientiousness of the particular judges. It is true that some judges are more lenient than others, and some are susceptible to persuasion, especially if applied by politicians[1] or newspapers,[2] but the fundamental trouble remains. Avoidable mistakes will always be made when judges are asked to decide in the dark.

The story is told of an ex-judge, then president of the Bar Association, who began a hue and cry about the leniency of the courts. Upon being shown by the county examiner his own record of "paroling" while judge,

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[1] A weak judge heeds a politician not because he desires to do so, but because he sees no escape. If such a judge were armed with a carefully prepared report on the defendant, he could successfully meet such importunities in an unworthy case.

[2] A former reporter relates the following story about a judge who is no longer on the bench: During a recess in the trial of a misdemeanor case, the reporters bet that they could make the judge sentence the defendant although the court had seemed inclined to favor him. A reporter then remarked to the judge, "You are not going to let that bad egg go, are you, Judge?" Sentence was promptly pronounced.

he promptly subsided. The late Judge Foran personally related that he recently "paroled" an embezzler upon many representations of good character made to him. A week later the parole officer brought in a record of conviction for stealing 20 barrels of whisky many years before, and only then the judge awoke to the fact that he had been this man's counsel at the former trial! In the *Plain Dealer*, April 7, 1921, is published a letter by Judge Cull to the County Council of the American Legion in which the judge writes of a veteran who pleaded guilty to perjury, " * * * nevertheless, after having sentenced him, some questions arise in my mind, and I know of no place to turn to to secure a friendly interest in the prisoner unless it is from your organization." On March 11, 1918, one Andrew Kebort pleaded guilty to the charge of robbery, and for some reason was not sentenced. About a year later an Assignment Commissioner was appointed and he began to press for disposition of ripe cases. Purely for the purpose of completing the record, apparently, the presiding judge[1] caused an entry to be made on June 9, 1919, sentencing Kebort to the Reformatory and suspending the sentence.[2] In the meantime, on August 31, 1918, Kebort had been convicted and sentenced to the workhouse for petit larceny, and on July 16, 1919, after stealing an auto and robbing three people, he shot and killed one man and wounded two others while resisting arrest.

An ex-Municipal Court judge states that one of his colleagues, a man of unquestioned integrity, suspended sentence in the cases of certain gamblers because he had no information that they ran a notorious place. It was the former judge's opinion that a prominent city official wanted to "get something" on this judge, and so he was led into the trap of releasing well-known offenders.[3] A former judge states that during his term on the criminal bench July 14 was heralded as "Emancipation Day" because the cases of 75 negro prostitutes had been continued to that day. He was advised to suspend their sentences, and if they were brought in again to send them to the workhouse. This he did, but when they came in again, many under assumed names, it was almost impossible to identify them.

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[1] The original trial judge was no longer on the Common Pleas bench.

[2] The political lawyer who defended Kebort is reported to have "blamed" the resurrection of this case upon the establishment of the Assignment Commissioner's office.

[3] This same man observes that while on the bench he felt like the baby Emperor of China, wondering who would poison him next—the police, detectives, or prosecutors.

"Nolling" Cases

What is true of the "bench parole" and suspended sentences is equally true of the judge attempting to pass on the prosecutor's motion to "nolle" a case. Owing to the judges' inability to act intelligently on such motions, they have become largely a matter of form only, the judge accepting the prosecutor's statement of the facts. In the rush of the day's business it is nearly impossible for the judge to go fully into any case before granting the motion *nolle prosequi*.

Many cases are "nolled" because the defendant is already in the penitentiary, or has been convicted or acquitted on another indictment growing out of the same act, or because there is a patent defect in the indictment. It is easy in such cases for the prosecutor to convince the judge. In other cases, however, the prosecutor is presumably exercising his judgment on the merits, and this often results in the function of judge and jury being quietly exercised by an assistant prosecutor. Since these motions are usually made orally, and no court record of the reason is made, the lack of opportunity for judicial curiosity furnishes an easy mode of escape in many cases.

At least once in the official life-time of every prosecutor it is necessary to "clean house," viz., to clear the docket of hundreds of cases which have been accumulating for years but which, for one reason or another, should be "nolled." These include old cases in which the defendant has never been apprehended, or bail has been forfeited, or there have been sentences or acquittals on other charges growing out of the same deed. This clean-up takes the form of a "blanket nolle," presented on motion to the presiding judge of the criminal division. In February, 1920, such a motion, containing over 400 cases, was presented to Judge Kennedy. The utter futility of a judge's attempting to pass judgment on the merits of so many cases at one time is obvious.[1]

The motion *nolle prosequi* is another example of the decay of an institution which flourished successfully under the rural conditions of its origin, but which threatens to become a menace in a great modern city. Where the few criminal cases furnish diversion for the town, where the prosecutor is a marked man among his fellow-citizens, where interest in the crime and the criminals lightens the harvest and shortens the winter evenings, there can be little abuse of the motion *nolle prosequi*. Such checks are lost, however, in the rush and roar of a great city, especially

[1] No detailed analysis of the cases in the above "blanket nolle" is here made because that is properly a part of the study of the prosecutor's office. The point made here is the helplessness of the judge.

the typical American metropolis, with its mounting crime rate, its lack of a tradition of disinterested public service, and the insidious ramifications of political influence.

If the motion is retained, it should be made a real motion, so that the independent discretion of the judge is one with that of the prosecutor. Here, as in the case of the parole, the judge must be able to rely upon an impartial and thorough investigation.

Recommendations

Before proceeding to a consideration of the agency which should advise the court, a number of preliminary suggestions which seem essential may be made.

1. Preliminary Suggestions

The motion to "nolle" should be in writing, and should specify the reasons for the refusal to prosecute.

No "bench parole" or "nolle" should be granted until ample notice that the *court contemplates such action* is—

(1) Delivered to the complaining witnesses.
(2) Delivered to the police officers in charge of the case.

It should also be in the discretion of the court to direct that notices of motions to "nolle" be posted publicly in the court-house. This will protect the court and prosecutor against being compelled to act on an *ex parte* presentation by friends of the accused. An exception to the rule should be made in the case of violations of ordinances, non-criminal in nature, and perhaps of trivial misdemeanors.

The "blanket nolle" should be absolutely limited to cases involving no exercise of judgment, as most of the cases in such motion are at present, viz., old cases in which bail is forfeited, defendants not apprehended, or previously sentenced or acquitted for the same act. Before the motion is allowed, copies should be delivered to the Bureau of Criminal Identification for information and advice, and to the press for publication.[1]

The agency upon which the court should rely in disposing of criminal cases should be an *adequate Probation Department,* under a single head, appointed by the Common Pleas Court, organized to handle the criminal business before all the courts in city and county, exclusive of juvenile

[1] John A. Cline, ex-prosecutor of Cuyahoga County, reports that when in office he gave a list of cases in "blanket nolle" to the press two weeks before the motion was made, with notice that he would "nolle" unless someone appeared to object. This should be made a rule of court, but the publication should be after, not before, the motion is made.

cases. A Probation Department should exercise a double function, namely, to follow up cases placed in its custody, and to advise the court as to disposition after conviction, or upon a motion to "nolle." The first function is not here considered because it belongs more properly under a discussion of the general treatment of offenders, but the latter is vital to the present question.

2. An Adequate Probation Department

The disqualifications of the police and prosecutor's office as the court's reliance have already been discussed.[1] What is needed is a department which makes a business of studying offenders as human beings, which will make use of the excellent records kept by the Bureau of Criminal Identification, but round out these records as to offenses, and supplement them with the many considerations which never appear on a court docket.

Such probation as there is in Cleveland[2]—if what there is may be dignified by the name—is another proof of the rapid growth of the city and the apathy of its citizens toward the human aspects of government. One would have to travel far to find a great center which is guilty of such gross neglect. Three men and three women probation officers, forced to labor without clerks or stenographers, is the sum of what has been provided, and that grudgingly. These six are attached to the Municipal Court, none to the Common Pleas Court.[3] Paroling defendants to relatives, detectives, clerks, and even stenographers in the prosecutor's office[4] has made a joke of probation, but the Common Pleas Court has had no other agency afforded it. Mrs. Antoinette Callaghan and her two assistants in the Municipal Court understand their task and work hard over the women probationers, but theirs is an impossible problem. The men's Probation Department has apparently never been taken seriously by the city. Until James Metlicka came into office there was not, he says, even a system for recording payments, the checks being jumbled into a drawer or carried around in some one's pocket.

These feeble beginnings of probation should not be made the basis

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[1] Page 95, this chapter.

[2] Exclusive of the Juvenile Court.

[3] There is also one volunteer officer from the Woman's Protective Association.

[4] The Central Municipal Court in Boston, serving a population much smaller than that of Cleveland, has 26 probation officers, 15 clerks, a medical director, and an assistant director. In addition there are 19 probation officers attached to the district courts of the city, and nine probation officers to the Superior (County) Court. There are also many trained volunteer workers from social agencies working in conjunction with all the courts.

of judgment on the institution. A totally new conception of probation must be grasped, and a professional staff, adequate in numbers and personnel, established. Salaries should be commensurate with the importance of the office, and no man is too big for head of the staff.[1] Above all, the department must be kept out of politics.

3. A Central Bureau of Information

The Probation Department should establish as part of its work a Central Bureau of Information respecting persons charged with crime, containing the court records of offenders, together with all essential data relating to family, environment, physical and mental condition, etc. Such a record would aid the department in its treatment of offenders, and put it in a position to advise the court fully before disposition is made. In addition, valuable statistics would be collected to warn the people of Cleveland in time to forestall another breakdown.

The idea of such a Central Bureau has recently been gaining ground in Cleveland. The so-called "Day Bill," enacted into law this spring (G. C., Sections 13523, 13524, 13529, 13550), establishing the office of Bond Commissioner, imposes on the new office the consolidation of criminal records to be made up and transmitted by the Municipal and County Clerks. The educational value of this legislative beginning is considerable, and it should not be difficult, now, to transfer this duty, together with other collateral responsibilities, to the Probation Department when established. At a meeting of the Cleveland Bar Association May 7, 1921, the establishment of an advisory board of criminal prevention was recommended, to aid in the meting out of sentences, discharges, and paroles. Although the concrete measure suggested may not be the one best adapted to accomplish the purpose sought, this resolution places the Bar Association on record as recognizing a great need.

A probation staff, adequate for the needs of Cleveland, would mean a new expense, but whether an additional expense or not would depend on the economy effected in other much less essential branches of the government. Even if every cent appropriated meant additional cost, the expense is one which a civilized community cannot shirk. No man can compute what has been the cost to Cleveland of the failure to provide means for salvaging the redeemable portion of its erring citizens and of blindly unleashing on the community its worst enemies to pillage, terrorize, and murder. Even less calculable is the insidious effect upon the moral tone of the community.

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[1] Until a few months ago the head of the probation work in Detroit was Edwin Denby, now Secretary of the Navy.

CHAPTER IX

MOTIONS FOR NEW TRIAL

Frequency

EVEN after a case has gone through the trial stage and the jury has returned a verdict of guilty, there are still chances of escape for the defendant. Not only is there possibility of "parole" and appeal, but also a likelihood that the trial judge himself may grant a new deal by setting aside the verdict. In the group of Common Pleas cases begun in 1919 there were 292 original convictions for felony before known judges, 95 motions for new trial, of which 41[1] were allowed by the judges. Fourteen per cent. of all convictions were thus set aside, and 43 per cent. of all motions for new trial allowed.

Table 24 shows such motions by trial judges.

TABLE 24.—MOTIONS FOR NEW TRIAL, BY JUDGES

Judge	Total convictions	Motions for new trial refused	Motions for new trial allowed
Baer	44	8	3
Cull	52	8	10[2]
Day	1	1	..
Foran	27	1	1
Henderson	2	..	2
Jewell	3	..	1
Kennedy	16	8	4
Kramer	3	..	1
Levine	6	2	1
Pearson	16	5	..
Phillips	43	9	4[3]
Powell	40	5	4
Stephenson	2	1	..
Stevens	35	4	10[4]
Thomas	2	1	..
Total	292	53	41

[1] Three followed pleas of guilty.
[2] Three followed pleas of guilty.
[3] Two cases involving same crime.
[4] Four cases involving same crime.

Analysis of Results

Generally, the large percentage of new trials granted indicates poor work by the juries, since in most instances the new trial is granted by the trial judge because the verdict is against the weight of the evidence, and not because of erroneous rulings of the judge. In such cases a new trial is the only safeguard against rank injustice. From a study of the records in Cleveland, however, it is apparent that in most cases there is no real intention to grant another trial. The verdict is simply set aside in order to effect one of the many other adjustments. Table 25 shows the outcome of all the new trials granted in the group considered.

[redacted] IN 1919

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ERRATUM

On page 104, table 24, foot-note No. 2 should be taken out and foot-note No. 3 read for No. 2 as well as for No. 3.

	(brother of above)			
9	Pocketpicking	Cull	Kennedy	Pleads guilty to petit larceny, 10 days
10	Neglect to support	Cull	..	Continued
11	Violating auto law	Cull	Cull	"Bench parole"
12	Burglary and larceny	Cull	Cull	"Bench parole"
13	Carrying concealed weapons	Cull	Cull	Decree vacated, original sentence ordered executed
14	Burglary and larceny	Foran	Foran	Pleads guilty to petit larceny, 30 days and fine, suspended sentence
15	Grand larceny	Henderson	Pearson	Nolled
16	Abortion	Jewell	Pearson	Nolled
17	Auto-stealing	Kennedy	Kennedy	Dismissed, want of prosecution
18	Burglary and larceny	Kennedy	Cull	"Bench parole"
19	Grand larceny	Kennedy	Kennedy	Pleads guilty to petit larceny, $50 fine
20	Cutting to wound	Kennedy	Kennedy	Pleads guilty to assault and battery, $50 fine
21	Grand larceny	Kennedy	Kennedy	Nolled

TABLE 25.—DISPOSITION OF 41 NEW TRIALS GRANTED IN 1919—Continued

No.	Indictment	Judge at first trial	Judge, final disposition	Nature of final disposition
22	Robbery	Kramer	Kramer	Pleads guilty to assault and battery, 30 days and fine
23	Rape	Levine	Pearson	Nolled
24	Manslaughter	Phillips	Pearson	Trial, not guilty
25	Shoot to kill	Phillips	Stevens	Nolled
26	Housebreaking and larceny	Phillips	Bernon	Nolled
27	Housebreaking and larceny	Phillips	Baer	Nolled
28	Receiving stolen property	Powell	Powell	Nolled
29	Grand larceny	Powell	Baer	Trial, not guilty
30	Cutting to wound	Powell	Powell	Pleads guilty to assault and battery, 30 days
31	Cutting to wound	Powell	Phillips	Pleads guilty to assault and battery, 60 days
32	Manslaughter	Stevens	Stevens	"Bench parole"
33	Cutting to wound	Stevens	Stevens	Pleads guilty to assault and battery, 6 months
34	Robbery	Stevens	Stevens	Pleads guilty to assault and battery, 30 days
35	Robbery	Stevens	Stevens	Pleads guilty to assault and battery, 30 days
36	Robbery	Stevens	Stevens	Pleads guilty to assault and battery, 30 days
37	Robbery	Stevens	Stevens	Pleads guilty to assault and battery, 30 days
38	Burglary and larceny	Stevens	Stevens	Pleads guilty to petit larceny, 30 days
39	Burglary and larceny	Stevens	Stevens	30 days and costs, suspended sentence, returned as parole violator
40	Pocketpicking	Stevens	Stevens	Pleads guilty to petit larceny, 30 days
41	Arson	Stevens	Powell	Nolled

Since only two cases out of 41 new trials granted actually went to trial, it is apparent that this motion is negligible for the purpose originally intended. This is perhaps natural in view of the fact that a defendant once convicted is more willing to plead guilty to a lesser offense than before trial. In all, 18 such pleas were accepted. In view of the number of convictions for "cutting to wound" set aside on this basis, it seems as if the judges were using the new trial to accomplish "rough justice," since most cases of this character are the result of brawls. Some of the defendants, however, seem particularly fortunate. In the rape case, No. 1, the conviction was set aside on evidence which should have been available at the trial, and the defendant was allowed to plead guilty to

assault and battery when there was no doubt as to his being guilty of at least an attempt to rape. The victim was a twelve-year-old girl. Nos. 2 and 19 were hardened criminals with long records, yet the latter particularly received gentle treatment, being fined $50 and set free to continue his career.[1] It need hardly be said that at least the same thorough consideration should be given to the disposition of a case after the conviction has been set aside as is urged in the preceding chapter.[2] It should be said that No. 9 was a case in which the prisoner, an old offender, aided the police materially in other cases, and the readjustment of his case was at the request of the police.

Ten cases were "nolled" after new trial granted, and one dismissed for want of prosecution. Generally, where a judge sets aside a conviction because the verdict was not sustained by the evidence, and the State has no further evidence to offer, a "nolle" is a proper disposition. At least two of these cases, however, had the unusual feature of a new trial being ordered after a plea of guilty. In No. 21 the defendant was sentenced to the Ohio State Reformatory, a note in the prosecutor's office reading, "Defendant pleads guilty to stealing a Dodge touring car, 1919 model, of the value of $1,000." A motion for a new trial was granted four months later, and a few weeks thereafter a motion to "nolle" the case was allowed. In No. 16 the defendant was indicted for auto-stealing with a count for operating a motor vehicle without the consent of the owner. He pleaded guilty to the court on March 1, 1920, and was sentenced to the Reformatory. On June 7 a motion for a new trial was allowed, and on June 29, 1920, the case was dismissed "for want of prosecution." Inquiry develops the fact that the owner of the car was not notified of any new trial, and in April, 1921, still believed the original

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[1] This criminal came before the court again within a few weeks on an indictment for burglary and larceny. The judge granted a motion to discharge, but within a month this man was arrested for another "job" in Elyria, and his operations were temporarily interrupted by a sentence to the penitentiary by the Lorain County Court.

[2] No. 19017 in the Common Pleas Court, a 1920 case, illustrates the slipshod methods which damage the prestige of the court. The defendant was convicted of incest with his fifteen-year-old sister-in-law, and the testimony was that he had cohabited with her many times. It is reported that he had confessed his guilt to the officers before trial. On November 5 he was sentenced to the penitentiary, and later on the same day a motion for a new trial was filed. On November 12 the motion was allowed, a plea of guilty to assault and battery accepted, and the defendant sentenced to thirty days in the workhouse. The Humane Society, which had charge of the child, was not notified of this action and learned of it only by examining the court record.

sentence was executed. The following note by Assistant Prosecutor Corrigan is the only explanation of record:

"This case was called for trial by Judge Kennedy by mistake of the prosecutor's office. The wrong witnesses were subpœnaed. I stated to the court this fact and requested a continuance until the next day, at which time I would be ready for trial. The request was refused and the court peremptorily dismissed the defendant. There was no trial. No jury was impanelled."

Six defendants received a "bench parole" after new trial granted—five from Judge Cull and one from Judge F. E. Stevens or by Judge Powell for Judge Stevens. In one of Judge Cull's cases the defendant had pleaded guilty and then was granted a "new trial." One gets the impression in some of these cases that the judges, believing the defendants entitled to probation, use the device of granting a new trial to get them out of the Reformatory. Then, by a fresh plea of guilty, new sentence, and "bench parole," the desired result is accomplished. While this procedure in the hands of the two particular judges is not likely to be abused, there should be a definite rule against it. The general use of the new trial for this purpose might easily disrupt the entire penal law of Ohio and make the judges a target of continuous pressure and solicitation.

Clear Policy Recommended

It is time for the judges of the Common Pleas Court[1] to formulate a clear policy regarding new trials. The large number indicates—(a) poor quality of jurors; (b) weak or befogged charges by judges to the juries; (c) rearrangements to conform to the conscience of particular judges, but not to the law; (d) yielding to solicitation of the defendant's lawyer or relatives. A trial is not only an expense to the county, but, as has already been seen, it is a difficult matter to bring an accused as far as trial on the indictment. The steps in the administration of justice need drastic curtailing and not extension by a fictitious use of a new trial. The ends of justice will be served by confining this motion strictly within its legitimate scope.

[1] On account of the state of the records, a study of motions for new trials in the police court is extremely difficult. Moreover, such motions are relatively rare because of the scarcity of jury trials in that court. Where a judge tries without jury, he will not usually admit error in his own rulings, since he would not have made the rulings unless he believed them to be correct. New trials are, however, sometimes granted in this court by the judges, and where this is done, the considerations applicable to the Common Pleas Court apply with added force because of the cloudy records. Complete deception of complainants and public may be accomplished by the new trial in the Municipal Court.

CHAPTER X

PERJURY

Meaning of the McGannon Trial

AFTER the second trial of Judge McGannon for the murder of Harold Kagy, the air was filled with observations that a look behind the scenes in this case would reveal the whole trouble with Cleveland justice. This, of course, could not be so, since the trial of a Chief Justice for second degree murder, in the glare of publicity, is not a typical case in any administration of justice. In order really to learn about the system, it is far more helpful to watch the experienced "dip" or "big-job" man darting in and out of the net.

Through the effective work of Special Prosecutor William L. David in securing convictions for perjury, including that of Judge McGannon, we now know for certain that at the bottom of the second McGannon trial lay a something older than the written history of man—false testimony. Instead of secret powerful influences, we find the familiar story of perjury induced by love, hope of gain, and fear of destitution. Nevertheless, in his exposure of wholesale perjury Mr. David is also revealing one of the real weaknesses of the Cleveland system.

Those familiar with the administration of justice in Cleveland would probably agree that in the trials for the murder of Harold Kagy, Cleveland is paying the penalty in disgrace for its apathy toward the crime of perjury. In the second McGannon trial the court appeared helpless and prostrate before palpable perjury.[1] Criticism of the presiding judge for weak handling of the case is unavoidable. Miss May Neely, "star" witness for the State, had made a most detailed disclosure at the first trial, but at the second trial refused to testify, claiming privilege from self-incrimination. The attitude of this witness made a farce of the procedure of justice. Her answers to simple questions as to what she observed on the night of the killing consisted largely in unresponsive expostulations that "Judge McGannon did not kill Harold Kagy," and in parroting the formula, "I refuse to answer on the ground that it would tend to either disgrace or incriminate me." Puzzled as to how

[1] After the trial the judge who presided is reported to have expressed his opinion to the Bar Association that perjury had been committed.

the reply to simple questions as to what she saw could incriminate the witness, the judge asked her to explain to him privately the reasons for such a position. After this private explanation the judge supported Miss Neely whenever she refused to reply. However, he allowed the prosecuting attorney to examine Miss Neely fully in the absence of the jury, during which Miss Neely testified that she had told the truth at the first trial. It is manifest that the private explanation to Judge Powell was to the effect that the witness perjured herself at the first trial, since no other excuse would cover a refusal to answer the questions put to her. The situation then apparently became one where a witness informally tells a judge that she lied in her previous testimony, but under oath says that she told the truth. Under these circumstances a court sensitive of its position would have known how to deal with such a witness, even if not roused to action by her attitude earlier in the case.

The fact that Judge Powell did not vindicate the dignity of the court is typical of the general attitude toward perjury. Lawyers and judges tell of cases in which witnesses admitted perjury, but nothing was done. "The average witness has no respect for his oath," says a former Common Pleas judge; "in three out of five cases, civil or criminal, the judges and lawyers know some of the witnesses lied."

Laxness in Punishing Offenses Against Justice

The statistics for the Common Pleas cases begun in 1919 yield impressive evidence of this callousness toward corruption of the court's process. Out of more than 3,000 cases, only 27 were for offenses against public justice, of which 20 were bribery and 7 perjury. This was probably an unusually large number of such cases because of the indictments returned by the special grand jury in 1919. In view of the firm conviction of the bench and bar that perjury and subornation of perjury are common, this showing of less than 1 per cent. charged with such crimes is significant. Even these cases were disposed of as follows:

No bill by grand jury	3
Dismissed for want of prosecution	12
"Nolled" on all counts	7
Acquitted by jury	3
Pleaded guilty	1
Convicted by jury	1
Total dispositions	27
Total found or pleaded guilty	2
"Bench parole"	1
Total punished	1

Behind the McGannon trial, therefore, is a community which recognizes the prevalence of crimes against public justice but seeks to vindicate the law in only a handful of cases in a year for such offenses and allows all but one offender to escape.[1]

Recommendations

The attitude of the courts and public toward this kind of offense is not induced wholly by indifference, however. The perjury statute, G. C., Sec. 12842, provides as a penalty imprisonment in the penitentiary "not less than one year nor more than ten years." Undoubtedly the severity of this statute is a partial explanation of the paralysis of its enforcement.

The statutes relating to the giving and obtaining of false testimony should be amended in the penalty clause so that a judge could impose a severe fine or a workhouse sentence. Following this, an active campaign against perjury in civil and criminal actions would upset the old tradition and replace it with a wholesome respect for an oath. One judge has suggested a special prosecutor to handle perjury complaints alone. The vigor and success of Special Prosecutor David has opened the way for the new tradition. The campaign should not stop with the witnesses, however, but should reach beyond to the lawyers responsible for their offense. In this respect the Cleveland Bar Association has an imperative duty and opportunity. In the last analysis, however, the judges cannot delegate their responsibility to campaigns and prosecutors. Alert and strong judges, jealous of the sanctity of their court, constitute the only lasting insurance against the practice of perjury.

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[1] The drugged state of the public conscience is indicated by Petition No. 188262, filed by one of those indicted in the McGannon perjury investigation against Judge McGannon for balance due for services "in influencing Mary Neely to change her attitude in her testimony in a law-suit wherein he was charged with murder. * * *" An attempt was made to withdraw this petition upon the indictment of the petitioner for the crime set out in his own petition.

CHAPTER XI

JURIES

General Dissatisfaction

THE service performed by juries does not lend itself to appraisal by the statistical method. Without knowing the facts in each case one is not able to conclude whether an acquittal, disagreement, conviction, or verdict was or was not justified. Even if the facts are known, it might well be that reasonable men differ in the inferences to be drawn from such facts. Since it is both impossible and undesirable to retry cases in this survey, one is forced to rely upon opinion evidence as to the quality of service rendered by jurors in Cuyahoga County.

The testimony of judges and lawyers is almost unanimous on the point of dissatisfaction with juries. "I have held court here two months and have never seen a business man on one of my juries," an out-of-town judge is quoted as saying after serving an assignment to Cuyahoga County. "Jurors recruited from the caverns of Ali Baba in the desert," remarked the oldest judge on the bench, with the hearty approbation of a large audience of lawyers.

We have already observed the large percentage of convictions set aside principally because of the poor work of juries. Although no new trial may be granted for error in acquitting a defendant, we may assume that the average jury errs much more on the side of leniency than severity. The community has probably suffered considerably because of this tendency, in view of the fact that acquittals have increased 600 per cent. since 1914. Juries are blamed for the large number of disagreements during the January, 1921, term of the Common Pleas Court. Upon receiving a surprising verdict of acquittal the judge who presided at the trial is quoted as observing to the jury that "it is apparently now lawful to attack a man with an axe, provided the blunt side only is used."

History

In judging the operation of the jury system, its history in Cuyahoga County should be considered. There is no doubt that opportunities for corruption and actual dishonesty have greatly decreased in recent

years. Lawyers tell the story of a long fight between counsel for the great public service corporations and the personal injury attorneys, in which the jury system was debauched by campaigns for the allegiance of enough jurors to insure victory at the ensuing trials. In those days the jury commissioners made up lists of jurors from names submitted by various persons so that it was a relatively easy matter for an influential corporation or a tort lawyer in large practice to secure picked men on the jury lists. Then in some mysterious manner these names were drawn from the wheel. In the ten-year period from 1905 to 1915, out of a total of 11,126 names placed in the jury wheel, 386 names appeared a total of 2,317 times, or an average of six times each. In the course of the ten years 5,489 names were drawn from the wheel and 388 names were drawn 1,923 times, or nearly 40 per cent. of the total drawn. "It is entirely safe to say, however, that if the drawings had been left to chance, as the law intends, it would have been impossible to have drawn out so many repeaters."[1]

The Present System

During the past few years the system has been changed so that many of the glaring defects have been obviated. Under the present method, when the court instructs the jury commissioners to secure a certain number of jurors' names to be placed in the wheel, the commissioners make a rough estimate of the number necessary to call in order to qualify the number requested. The commissioners then roughly divide the total which they must call into the number of electors, and use the quotient as a key number. Thus, if the presiding judge requests 3,500 names for a term, the jury commissioners estimate that it would take 10,000 names to qualify this number, and dividing 10,000 into the total number of electors they secure, for example, the key number 20.[2] The commissioners then take every twentieth name upon the polling list, and send out a form letter to each name and address checked, asking the addressee to report for examination upon a certain date. Next occurs the first examination of prospective jurors by both commissioners, which proceeds until at least 3,500 names are accepted. The list of those accepted is then certified to the clerk of courts and the list is spread on the journal of the court. The clerk copies the list on slips of paper, and in the

[1] *The Municipal Bulletin*, January, 1916, pages 3 to 6.

[2] Rule 23 (b) requires that the court designate a key number, but owing to the necessity of securing names from each ward in proportion to its population, the commissioners have adopted their own method of securing a key number.

presence of the jury commissioners the slips are placed in the wheel, the wheel locked, and the key given to the presiding judge, from whom the clerk must get it each time a jury is required to be drawn. Formerly the custody of the key, as well as of the wheel, was given to the clerk, but the change was made when the system was reformed a few years ago.[1]

The names once placed in the jury wheel become the sole source of petit juries in both civil and criminal cases, and to some extent of grand juries. The drawings are made by the clerk and sheriff. Every other week the presiding judge orders that a certain number of names be drawn from the wheel as petit jurors, and for each term the presiding judge of the criminal division orders a number of names to be drawn for grand jurors. Separate drawings are made for juries in first degree murder cases, and in such cases the venire must be returned at least fifteen days before the date set for trial. When the original is returned, the clerk draws an *alias venire* without further order of the court, and the alias is composed of two names for every one not found on the original venire. The *alias* is returnable forthwith, and both original and *alias* are served on the defendant and his attorney three full days before the trial. If a jury for the first degree murder trial cannot be secured from the original and the alias, the judge issues further orders until the jury is complete.

In the case of petit jurors, exclusive of first degree murder cases, service is made by letter postpaid and the sheriff's return is stamped upon a paper containing the entire list. In murder cases and for grand juries the sheriff actually serves summonses.

The petit jurors summoned by letter are expected to serve unless excused by the presiding judge. Those who answer the letter and are not excused are sent to the rooms of the jury bailiff, who assigns them to various cases as the need arises. In the case of the grand jury, "if the number is insufficient, the court may issue a special venire to the sheriff and command him to summon the persons named therein and to attend forthwith as grand jurors" (Sec. 11431). Since the original venire drawn from the wheel for grand juries rarely produces enough qualified men, the judge usually selects additional persons, often a majority of the talesmen.

This is the system under which Cleveland juries have been recently selected. Although the personnel of the grand jury is largely dependent upon the presiding judge, this institution is so much a part of the prose-

[1] To the retiring clerk, Mr. Haserodt, much credit is due for the improved operation of the system.

cuting machinery that it is considered in the study of the prosecutor's office. With respect to petit juries, improvements over the older system are: first, substitution of chance for selection upon solicitation; second, reduction of length of service from a term to two weeks, thus reducing the hardship on individual citizens and the opportunities for corruption; third, unlocking the door to the room in which the drawings take place.

Weaknesses

The fundamental weakness in the present jury system is inherent in all attempts to make trial by jury work in a great modern city. Personal service by the sheriff or his deputies upon thousands of jurors during the course of the year is impracticable and expensive, and compelling attendance by mailed summonses is difficult. Indeed, the late Judge Foran, in his report on the selection of jurors dated February 28, 1921, doubts whether the present method is a proper compliance with G. C., Sec. 11297–1, providing for substituted service by mail, even granting the validity and effectiveness of that statute.[1] The suggestion that the number of jurors be cut down by extending the term of service for the individual juror again increases the difficulty of securing fit men who can sacrifice so much time from commercial and industrial pursuits. Even with only two weeks to serve, the number of people who are excused by the jury commissioners and the court is disproportionately large.

Another weakness of the system is that there still remains some small margin of discretion in the selection of jurors which is vested in a minor official; namely, the jury bailiff. When a jury is called for, the jury bailiff selects a group from among the idle jurors in his room and sends them down.[2] No matter how honest a jury bailiff may be, this situation will create suspicions which tend to undermine respect for justice. Lawyers complain that in trying against a public service corporation, for instance, they sometimes find a disproportionate number of its employees on the jury, and, vice versa, in trying against some of the ablest tort lawyers, they find a surprisingly large number of jurors

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[1] Judge Foran aptly quotes "*Henry IV*":

> "Glendower: 'I can call spirits from the vasty deep.'
> "Hotspur: 'Why, so can I, or so can any man;—but will they come when you do call for them?' "

[2] Rule 23 (9) of the Common Pleas Court directs the jury bailiff to assign jurors in the order in which they are drawn, but apparently practical difficulties have forced the breakdown of this rule.

of the same nationality as the foreign plaintiff. Whether such suspicions are founded upon mere coincidence, or exist only in imagination, the remedy is simple. The names of all jurors waiting to be called should be placed in a jury wheel in the assignment room or in some other public place, and, as new juries are called for, should be drawn from the wheel in the presence of attorneys for all the parties. Some jurors might thus serve more continually than others, but this objection is outweighed by the fact that a feeling of absolute fairness would be created.

The jury commissioners are commanded by G. C., Sec. 11423, to "select such number of judicious and discreet persons, having the qualifications of electors of such county, as the court may direct," and further that "no person shall be selected who shall not, in the judgment of such commissioners, be competent in every respect to serve as a juror." It will thus be seen that, except for certain statutory exemptions, the commissioners are unlimited except as to electors, and in Ohio there is not even a literacy test for electors. To the commissioners falls the task of weeding out of the electors great numbers of foreign-speaking citizens, besides ignorant and shiftless native whites and blacks. Even if the commissioners were well-paid officers and men of large ability, which they are not, the task could scarcely be performed with thoroughness.[1] Hitherto the office of commissioner has been a political trinket, yielding only $300 per year. The Common Pleas judges made a wise change this spring by appointing as commissioners the two assignment commissioners, Virgil A. Dustin and Archie J. Kennel, both able men. This step should be productive of some improvement.

First Examination of Jurors

The failure of the jury system, however, has a deeper cause than any schematic defect. In Cleveland, as in many other large cities, most citizens of means or intelligence avoid service. This avoidance has become traditional, so that it is a kind of mild disgrace for a so-called "respectable citizen" to allow himself to be caught for jury service—like being swindled, for instance. Table 26 shows the results of the letters and preliminary examination by the jury commissioners for

[1] In Boston the preliminary examination is made by the police in a house-to-house canvass. Since in Massachusetts naturalized citizens must be able to read English, the police need only eliminate the morally and physically unfit. Although a policeman is hardly an ideal judge of a juror's qualifications, he has only his own precinct to canvass, which makes the task relatively easier.

the January term, 1921. For purpose of comparison, Wards 11 and 14, largely of shifting white, foreign, and negro population, and the recognized prosperous suburbs of Cleveland Heights, Lakewood, East Cleveland, and Shaker Heights are given separately. The reasons given for the failure to qualify on this examination are those recorded by the commissioners, although some rearrangement has been necessary in order to assimilate kindred excuses into as few classes as possible. Credit is due Thomas Gafney and Gibson H. Robinson, the retiring commissioners, and William H. Ence, their bailiff, for keeping such a record. No record of the kind is available for prior terms.

TABLE 26.—REASONS FOR FAILURE TO QUALIFY OF 6,520 PERSONS CALLED FOR JURY SERVICE, CLASSIFIED BY TYPICAL RESIDENTIAL SECTIONS

Reasons for failure to qualify	Totals	Ward 11 [1]	Ward 14 [2]	Cleveland Heights	Lakewood	East Cleveland	Shaker Heights
1. Letters returned	857	48	3	7	8	9	5
2. No answer	1,826	43	27	60	71	30	11
3. Illness, etc.	565	15	8	10	26	15	4
4. Physical disability	220	4	2	5	3	2	..
5. Literacy and language	919	32	18	..	6	..	..
6. Military order, contributing to	16	..	..	2	1	1	..
7. Business	89	2	2	3	2	1	..
8. Home duties	457	10	8	18	27	18	6
9. Financial	7	..	..	..	..	..	..
10. Occupational	634	7	6	19	15	4	3
11. Age	265	7	4	7	11	5	..
12. Served recently	269	1	7	5	4	1	..
13. Away or late	285	7	1	13	17 [3]	11	..
14. Deceased	33	2	..	..	..	..	..
15. No explanation	43	2	1	2	..	..	..
16. Serve later	11	..	..	..	..	..	..
17. By judge	16	..	..	..	1	..	..
18. In reformatory	1	..	..	..	..	..	..
19. In jail	1	1	..	..	..	..	..
20. In penitentiary	2	..	..	..	..	..	..
21. Letter from New York attorney	1	..	..	..	..	..	..
22. Not citizen	1	..	..	..	..	..	..
23. Paroled	1	..	..	..	..	..	..
24. Too busy	1	..	..	..	..	..	..
25. Total not qualifying	6,520	181	87	151	192	97	29
26. Total qualifying	3,968	74	58	75	128	69	5
27. Total letters sent	10,488	255	145	226	320	166	34

[1] Colored and shifting.

[2] Foreign—Poles, other Slavs, and Greeks.

[3] Majority were late.

It will be observed that in the four better sections, about 37 per cent. of those who did not qualify simply ignored the summons,—No. 2, "no answer,"—as compared with 28 per cent. for the total—including these suburbs, and 26 per cent. for Wards 11 and 14. In other words, those whose ignorance might excuse them for not responding made a much better showing than the "substantial citizens," who knew too much to heed the summons. It also seems that the exclusive suburbs are much more unhealthful than the poor districts,—No. 3, "illness, etc.,"—since in those sections 12 per cent. of those who did not qualify were excused because of illness, compared with 8.7 per cent. of the total of Wards 11 and 14. Illness is reported proportionately almost 50 per cent. more often in the most desirable residential districts.

In the four suburbs 9 per cent. of those who did not qualify reported that they were away at the time of the summons,—No. 13, "away or late,"—or received it too late, as compared with 4.4 per cent. of the total, and 3 per cent. in Wards 11 and 14. Since the shifting population in the suburbs is much smaller than in the poorer sections, one may conclude that the excess of excuses of this type represents winter vacations, business trips, or subterfuge.

No conclusion can be drawn from the increase of "home duties" excuses—No. 8—in the suburbs, because most of those excused for this reason were women, and women electors were not called proportionately from the different sections. This was due to the fact that two polling lists were used by the commissioners—an old one before the suffrage amendment was passed, and the new one for 1920. It is to be hoped that women from these and kindred sections will not shirk their jury duties as their husbands and fathers have done. Such women, on the whole, have more leisure than any other group of citizens, and, as a rule, they possess the qualifications of good jurors. Some judges and lawyers already profess to see a higher grade of juries owing to the advent of women. Others, however, feel that the women jurors who have been serving are generally not noticeably superior to male jurors and that their presence has brought neither harm nor benefit to the system.

It should be observed that literacy and language disqualifications were practically unknown in the selected suburbs. Also, it is worth noting that in the suburbs only 6.2 per cent. of those not qualifying could not be located, compared with the general average of 13.1 per cent. "Business," No. 7, and "financial," No. 9, represent those excused because their presence was vital to their business, or because they could not afford the financial loss involved in jury service. A large proportion of the "business" excuses were from men operating a "one-

man" business, or if in a country district, a "one-man" farm. A favorite excuse in the rural settlements was that the notice was received "too late,"—No. 13,—reflecting the slowness of the midwinter mails in the country, or the tendency on the part of farmers to call periodically at the local post-office.

"Occupational," No. 10, includes chiefly those excused because employed in occupations exempted by the statute, G. C., Sec. 11444—public officers, clergymen, priests, physicians, police, and firemen. Most of this group were public employees of various kinds.

It is to be noticed that only 16 were excused because "contributing to a military order"—No. 6. Probably among those who failed to answer were additional contributors to such orders, who held this exemption as a secondary defense in case of trouble caused by ignoring the summons. Although the members contributing to military societies number in all only 600,[1] this bizarre method of escape does much harm to the public morale in performing jury service. In effect, it means that influential citizens may purchase immunity from an important civic duty at five dollars a head.

Present statutes exempting contributing members are G. C., Sec. 5195, in substance the original provision, and G. C., Sec. 11444, where contributing members have been recently added as specific exemptions. The section first cited also exempts such members from "labor on the public highways," thus adding a quaint touch of the mediæval "corvee" to the distinction.[2] This exemption reveals somewhat the decay of democracy. Originally Ohio frontier conditions required that all able-bodied white male citizens be made part of the militia. Then, as conditions settled, a system of volunteer companies developed. In 1857 the members of such companies were excused from jury service or service on roads, 54 O. L. 49–50, Sec. 11. Then came the Civil War draft laws, establishing the principle that immunity from military service might be purchased. Shortly thereafter "contributing members" were added to the personnel of the independent companies, and these non-combatants[3] shared in the immunities granted to the others. This anti-

[1] Four societies, numbering 150 members each.

[2] It exists, however, in rural districts of Ohio.

[3] The most recent statute exposes the contributing member to the possibility of performing military duty within the county limits. It is doubtful whether this remote contingency will restrain the jury slackers as a whole from continuing to avail themselves of the exemption. The previous statute, which imposed no obligation on contributing members beyond the payment of a fee, had been held unconstitutional. Hamann v. Heekin, 88 O. S. 207 (1913).

democratic exemption ought to be abolished, just as the principle was abolished in the draft laws of the Great War.

The Second Examination of Jurors

In addition to the examination before the commissioners, a second opportunity for jurors to escape is granted when qualified jurors are drawn from the wheel and summoned finally for service by mail. The

TABLE 27.—RESULTS OF SECOND EXAMINATION OF JURORS, CLASSIFIED BY WARDS AND OTHER POLITICAL SUBDIVISIONS

Ward	Total serving	Served regularly	Postponed and served	Served part time (excused orpostponed)	Total not serving	Excused	Postponed, never served	Not found	No record
1	29	20	8	1	5	1	2	1	1
2	53	43	7	3	5	3	1	..	1
3	40	39	1	..	4	..	4	..	..
4	29	24	4	1	4	2	..	2	..
5	36	30	5	1	5	2	2	1	..
6	108	92	13	3	21	13	6	1	1
7	37	32	5	..	8	2	2	3	1
8	25	18	6	1	12	5	4	3	..
9	24	19	5	..	10	2	4	2	2
10	28	27	1	..	8	1	4	2	1
11	32	29	3	..	9	..	7	1	1
12	16	13	3	..	3	..	1	2	..
13	14	13	1	..	3	1	1	1	..
14	20	19	1	..	1	..	..	1	..
15	66	53	10	3	17	2	11	1	3
16	50	46	4	..	14	10	3	..	1
17	23	21	2	..	5	3	1	1	..
18	37	32	5	..	13	6	3	2	2
19	26	21	2	3	10	4	4	2	..
20	14	11	2	1	8	4	3	1	..
21	26	22	3	1	15	6	5	2	2
22	32	27	3	2	10	4	3	1	2
23	27	25	1	1	5	3	..	..	2
24	51	43	8	..	15	7	5	2	1
25	25	21	4	..	14	2	11	1	..
26	55	47	8	..	22	8	8	2	4
Districts									
East Cleveland	31	25	6	..	7	2	5	..	..
Lakewood	29	26	3	..	10	4	5	1	..
Cleveland Heights	21	18	2	1	6	4	1	1	..
Shaker Heights	1	1	..	..	..	..	..	..	..
Miscellaneous	93	82	10	1	23	11	6	3	3
Not located in any ward	96	71	23	2	46	14	20	11	1
Total	1,194	1,010	159	25	338	126	132	51	29

initiated again ignore the letter. Those who respond may present their excuses to the presiding judge. Table 27, compiled from records in the jury commissioners' office, shows the number excused on this second occasion.

Table 28 is a comparison of the total letters sent out, the number who qualified, the number drawn for service, and the number serving

TABLE 28.—SUMMARY BY SELECTED RESIDENTIAL DISTRICTS OF THE NUMBERS OF JURORS CALLED, QUALIFIED, AND SERVED

Residential districts	Total letters sent out	Total qualified for service	Total drawn for service	Total served regularly	Total served
Ward 11	255	74	41	29	32
Ward 14	145	58	21	19	20
East Cleveland	166	69	38	25	31
Lakewood	310	118	39	26	29
Cleveland Heights	226	75	27	18	21
Shaker Heights	37	5	1	1	1
Total for city	10,448	3,968	1,532	1,010	1,194

regularly and part time. For purposes of comparison, Wards 11 and 14 and the four suburban districts are again listed separately. Of these, Ward 14 makes the best showing, qualifying almost as many as East Cleveland, but showing a higher per cent. serving of those actually drawn.

A summary table of the excuses accepted by the judge is also given (Table 29). This is not classified by wards because some cards were misplaced while tabulating the results and they are not included.

TABLE 29.—REASONS FOR EXCUSING PERSONS FROM JURY SERVICE, JANUARY TERM, 1921 (RECORDS FOR 65 JURORS MISSING)

Illness	40	Served recently	5
Physical disability	7	Away or late	11
Literacy and language	3	No explanation	18
Contributing member of military society	1	Too many jurors	38
Business	7	End of term	6
Home duties	11	Miscellaneous	1
Occupational	11	Total	164
Age (old or young)	5		

Occupation of Jurors

No record is kept anywhere of the occupation of jurors. Through the courtesy of the presiding judge and the jury bailiff, L. M. Jalos, a

record was kept for four weeks during April and May, at the request of the survey. This is given in Table 30. The occupations listed are those given by the jurors to the jury bailiff, and therefore probably represent the most optimistic appraisal which a man may place upon his own capacities. It means little if a man calls himself a painter, merchant, superintendent, etc., unless more is known about his specific occupation. An attempt has been made to assimilate kindred occupations into general classes, but the grouping probably does not meet all requirements. If so, separate figures are given for each occupation, so that a regrouping is comparatively easy.

TABLE 30.—THE OCCUPATIONS OF JURORS, APRIL 18–MAY 18, 1921, AS REPORTED BY THEM, BY GROUPS OF RELATED VOCATIONS

	No.	Per cent.		No.	Per cent.
CLASS 1.			Salesman	24	..
Executive	12	3.0	Clerk	19	..
Office manager	1	..	Telephone operator	2	..
Department manager	2	..	Agent	2	..
Telephone night manager	1	..	Secretary	1	..
Delivery route manager	1	..	CLASS 6.		
Sales manager	2	..	*Merchants and tradesmen*	22	6.0
President	1	..	Merchant	5	..
Superintendent	4	..	Grocer	7	..
CLASS 2.			Butcher	2	..
Technical and artistic	17	4.0	Grocery store manager	1	..
Draftsman	1	..	Meat dealer	1	..
Electrical engineer	1	..	Laundryman	1	..
Civil engineer	5	..	Baker	4	..
Chemist	1	..	Barber	1	..
Transportation expert	1	..	CLASS 7.	3	0.7
Artist	2	..	Saloon-keeper	1	..
Designer	1	..	Hotel-keeper	1	..
CLASS 3.			Poolroom proprietor	1	..
Contractors	6	1.5	CLASS 8.		
Teaming contractor	2	..	*Domestic*	41	11.0
Electrical contractor	1	..	At home	38	..
Building contractor	2	..	Nurse	3	..
Auto livery	1	..	CLASS 9.		
CLASS 4.	6	1.5	*Farmer*	8	2.0
Insurance agent	2	..	CLASS 10.		
Real estate agent	4	..	*Service employees*	20	5.0
CLASS 5.			Chauffeur	4	..
Clerical	68	18.0	Footman	1	..
Bookkeeper	5	..	Janitor	1	..
Stenographer	5	..	Gardener	3	..
Cashier	2	..	Watchman	5	..
Accountant	3	..	Guard	1	..
Collector	1	..	Cook	1	..
Teller	1	..	Porter	2	..
Claim agent	1	..	Elevator operator	1	..
Saleslady	1	..	Furnaceman	1	..

TABLE 30.—THE OCCUPATIONS OF JURORS, APRIL 18–MAY 18, 1921, AS REPORTED BY THEM, BY GROUPS OF RELATED VOCATIONS—Continued

	No.	Per cent.
CLASS 11.		
Skilled workers	30	10.5
Painter	6	..
Carpenter	16	..
Electrician	3	..
Decorator	1	..
Plumber	2	..
Mason	1	..
Enameler	1	..
CLASS 12.		
Needleworkers	7	2.0
Furrier	2	..
Tailor	3	..
Bushelman	2	..
CLASS 13.		
Special workers	16	4.5
Chairmaker	1	..
Tentmaker	1	..
Potter	1	..
Printer	6	..
Windowmaker	1	..
Shade finisher	1	..
Artificial limb maker	1	..
Asbestos worker	1	..
Movie operator	1	..
Cigar manufacturer	1	..
Grease maker	1	..
CLASS 14.		
Foremen	5	1.0
Shop foreman	1	..
Dock foreman	1	..
Foreman auto works	1	..
Barn boss	1	..
Railroad track foreman	1	..
CLASS 15.		
Inspectors, etc.	11	3.0
Auto inspector	2	..
Machinery inspector	1	..
Fire inspector	1	..
Street railroad inspector	1	..
Tool inspector	1	..
Car inspector	1	..
Estimator	1	..
Stock-keeper	3	..
CLASS 16.		
Engineers, conductors, and allied occupations	28	7.0
Railroad switchman	5	..
Street-car conductor	5	..
Engineer	5	..
Fireman	3	..
Stationary engineer	5	..
Brakeman	1	..
Street-car yardman	1	..
Railroad signal block operator	1	..
Telegraph lineman	1	..
Railroad man	1	..
CLASS 17.		
Metal workers, repairers, laborers	85	22.0
Machine hand	2	..
Steel worker	4	..
Pipefitter	1	..
Pattern manufacturer	1	..
Iron chipper	1	..
Welder	1	..
Assembler	2	..
Iron worker	3	..
Temperer	1	..
Cable splicer	1	..
Sheet-metal worker	2	..
Electrical worker	1	..
Boilermaker	1	..
Boiler-tube welder	1	..
Rod-mill worker	1	..
Tool grinder	2	..
Coremaker	1	..
Machine operator	1	..
Car builder	1	..
Machine hand	1	..
Molder	2	..
Solderer tinware	1	..
Auto-body builder	1	..
Elevator erector	1	..
Machinist	18	..
Auto mechanic	2	..
Car repairman	1	..
Die and toolmaker	4	..
Blacksmith	1	..
Millwright	3	..
Galley man, American Express	1	..
Teamster	4	..
Stonecutter	1	..
Woodworker	1	..
Toolmaker	1	..
Truck driver	4	..
Laborers	10	..
CLASS 18.		
Sailor	1	0.2
CLASS 19.		
Retired	1	0.2
Grand total	387	..

It may be said that the list of occupations, even allowing for some inflation natural to man's desire for dignity, fairly represents the bulk of Cleveland's population. This is probably true, but a system designed to select for the difficult task of administering justice "judicious and discreet persons, competent in every respect to serve as jurors," does ill to produce even a cross-section of a great unassimilated industrial population. The qualifications for a competent juror are high.

Experience shows that the best juror is a man of integrity and intelligence, with some education and an unwarped outlook on life. Such men are not usually found among the lowest or the highest walks of life. Those who have not the ability to rise to some extent, or are embittered by the experience of poverty, make equally bad jurors with the very rich whose property interests tend to bias judgment. There is little danger to the jury system from the latter group, however, because it is rarely represented on juries, but the former presents a serious problem.

Haven of the Unemployed

The winter of 1920–21 coincided with the greatest unemployment since 1914. It is to be assumed that in general, when a factory reduces its force, the least competent workers are laid off first. The action of the presiding judge of the January term, 1921, in permitting jurors to serve an additional two weeks if they desired, and longer on permission of the court, gives some gauge for ascertaining the number of men who preferred $2 a day on the jury to unemployment. During that term 77 jurors elected to serve more than the regular two weeks.[1] The following list shows the "repeaters" on petit juries in the January term, 1921:

28 served 3 weeks each, equalling 42 juror terms.
9 served 4 weeks each, equalling 18 juror terms.
40 served 12 weeks each, equalling 240 juror terms.
77 jurors served 300 juror terms.

The total number of jurors who actually served during this term was 1,194, leaving a balance of 1,117 jurors who served two weeks and less. Assuming that these jurors served full two-week terms each, we find that 77 jurors (6.4 per cent.) served more than one-fifth of the time, and 40 jurors (3.3 per cent.), nearly one-sixth of the total time! A few of these repeaters may have been retired men who enjoy the experience, but, on the whole, they consisted of men who were tiding over a period of unemployment by attempting to perform one of the most difficult tasks of democratic government at $2 per day.

[1] From a list supplied by the County Clerk's office.

Recommendations

Trial by jury is guaranteed by the Ohio constitution, and it is inconceivable that the people of Ohio would desire to abolish jury trial even if an amendment could be obtained. As it is now working, however, in large cities like Cleveland, justice in particular cases is being poorly administered and the dignity of the courts generally impaired. The system will not work satisfactorily until the intelligent citizens of the community assume a different attitude towards their obligations of citizenship. No remedy, therefore, will be effective unless the fundamental attitude is changed. It is a platitude, but nevertheless true, that a democracy worth the greatest sacrifices in war is equally worth preserving in peace. Something drastic should be done to dispel the scorn for jury service which has been collecting for many years. The most effective educational campaign might be started at once by an imposing list of prominent and busy citizens of Cleveland pledging themselves to perform jury service when called upon. *Noblesse oblige!*

Other steps to be undertaken are: *First*, the maintenance in office of jury commissioners who take their work with the utmost seriousness, and not as in the past, as a part-time recreation of minor politicians. The appointment of the assignment clerks to the commission should bring about a change for the better, but the court should always maintain close touch with the methods pursued. Real discretion exercised by the jury commissioners in the matter of excluding jurors who have no qualifications except indigence, and in firmly refusing to accept excuses made for the occasion, would certainly result in improving the personnel of the juries. *Second*, the rules of the court and the statutes of the State should be so amended as to insure the validity of service by mail, and the practice maintained in strict conformity with the law. A few fines for contempt of court for failing to respond to mailed summonses would quickly put an end to the present wholesale ignoring of the court's call. *Third*, the legislature should be asked to abolish the exemption of contributing members of military societies. *Fourth*, discretion now resting in the jury bailiff with respect to assigning idle jurors to cases should be eliminated and open selection by chance substituted therefor. *Fifth*, the adoption of the rule recommended by the late Judge Foran providing that judges shall not excuse any citizen called for jury duty except in case of death in his immediate family, or in case of great emergency, where the juror is likely to sustain a serious or irreparable loss if required to perform jury service.

CHAPTER XII

SUMMARY OF RECOMMENDATIONS

Organization and System

THE criminal law in Cleveland is administered by three courts. The Court of Appeals reviews cases for errors of law only, and for our purposes may be dismissed from further consideration with the statement that it performs its special duty satisfactorily and gives rise to no particular difficulty. The Court of Common Pleas is the great trial court, with criminal jurisdiction over felonies, that is, over the more serious offenses. The Municipal Court on its criminal side has jurisdiction over misdemeanors, that is, over the lesser offenses, over violations of city ordinances, and over the preliminary hearings in felony cases.

While a lawyer from Mars might fail to understand the reason for this sort of double-decked jurisdiction, based on the more or less arbitrary differentiation between cases in which the punishment may be imprisonment in the penitentiary and those in which such punishment is not lawful, and might wonder why an intelligent community did not marshall and concentrate in a single court all its forces for combating the criminal in order to eliminate the waste and loss of power caused by duplication of effort and overlapping of functions, yet it must be remembered that this dual situation is the result of historic development. Prior to the growth of great industrial cities, when the population was homogeneous and lived in rural communities, serious crimes were rare in occurrence and the business could be attended to by the judges who went around the circuit holding court for a term, that is, for a week or so, in the several county-seats. To provide for a prompt determination of petty offenses and to afford an immediate preliminary hearing in serious cases the system of local courts grew up. The jurisdiction of the lower court was expanded to keep pace with the community it served, and the pressure of business extended the term of the higher court until it was obliged to hold sittings through the year and became a localized court. The final result is two courts substantially alike from any organic point of view, operating entirely independently in the same community. This anom-

alous condition, be it understood, is not the result of evil schemings by any persons or groups of persons: it has been produced by a series of successive developments, each one of which seemed at the time wise and calculated to promote the ends of justice.

These two courts embody within themselves many lessons learned from experience, and, while they unquestionably need improvement to conform to the changed conditions of the city's life, care must be exercised in any adaptation or merger of their functions not to lose the elements of strength which they contain. Double trials on the facts, which are the greatest curse of the double system of courts, have already been eliminated in Cleveland—a forward step which Massachusetts, for example, has never been able to accomplish despite repeated efforts by the bar and judicature commissions.

The Municipal Court possesses a good form of organization. The act which created this court and provided for a Chief Justice with power to order and arrange the business of the court was hailed at the time of its adoption as a great constructive improvement by the most competent legal critics. It still affords a machinery for the efficient dispatch of business far superior to that possessed by the majority of American courts. There is a tendency to decry this form of organization because one Chief Justice lacked the character to utilize it to its best advantage. This is putting the cart before the horse. The requirements for the successful administration of justice are three: sound controlling ideas, sound organization, and sound men. A breakdown proves that one of these conditions has been violated, but it does not follow that the other two were at fault. Any radical alteration (other than that later suggested) of the present form of organization of the Municipal Court would be a step backward and would throw away an accomplishment of which Cleveland should be proud.

The Common Pleas Court, though lacking as excellent an organization as the Municipal Court, possesses power to make its own rules and to regulate its business. It is thus equipped to conduct its work in a reasonably efficient manner. To vest this power in the court is such obvious common sense that the fact would not merit comment except that numerous courts in other jurisdictions have not been given even this much self-government. In this particular, therefore, Cleveland is certainly not below the average condition.

To further facilitate the prompt and orderly dispatch of business the office of Assignment Commissioner has been established. The way has thus been opened for the elimination of the enormous waste of time and productive energy of attorneys, parties, and witnesses waiting for their

cases to be reached, which is a scandal of such venerable antiquity that in many jurisdictions it has been given up as hopeless and is regarded as somehow a necessary adjunct to the judicial system.

To the credit of the County Clerk, the Common Pleas Court has been practically ridden of professional bondsmen. Through a recent statute limiting the number of bonds on which any individual may go surety, and creating the office of Bail Bond Commissioner, this great gain should be effectively retained in the Common Pleas Court and as effectively extended to the cases in the Municipal Court. Thus, one of the worst by-products of our criminal system is being eliminated in Cleveland, although the nefarious traffic is still profitably pursued just outside the portals of many other American courts of justice.

The power lodged in the prosecuting attorney to "nolle pros" a case, that is, to throw a case out of court by saying "I do not wish to prosecute" it, is logically and necessarily a part of the authority which must be vested in that important official. There is, however, today a wide-spread suspicion that the power is perverted in many instances for improper purposes. The full bench of the Massachusetts Supreme Judicial Court has this year heard charges preferred by the Attorney General against a county prosecuting attorney involving alleged abuses of this power.

It is notorious that the records and statistics of many American courts are inefficient and inadequate, and that this unbusiness-like conduct is a productive cause of difficulty. This is in part true in Cleveland, but not as to the work of the County Clerk's office or the Bureau of Criminal Identification, both of which deserve cordial praise for their general excellence.

Personnel: Elections

The 12 judges of the Court of Common Pleas are nominated by direct primaries and are elected by popular vote. Their tenure of office is only six years. The yearly salary is $8,000.

The 10 judges of the Municipal Court are nominated by petition and are elected by popular vote. Their tenure of office is only six years. Their yearly salary is $7,500.[1]

The appraisal of the personnel of the bench is so intimately bound up with the difficult question of whether judges can properly be selected by popular vote that it has been given extensive consideration in preceding chapters; but it may here be noted that many of the weaknesses inherent in this method have been attacked in Cleveland and that some progress has been made toward minimizing their dangerous effect.

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[1] The salary of the Chief Justice is $8,000.

All the judges are elected on a non-partisan ballot and non-partisan elections have, in fact, been secured to a very real extent. Despite the traditional ingratitude of democracy, Cleveland has done tolerably well in keeping her judges on the bench either by reëlecting or by promoting them. Of the nine judges elected to the Common Pleas bench since 1912, six were Municipal Court judges; only two Municipal Court judges have failed as candidates for the higher bench. In the Municipal Court only one judge has been defeated for reëlection. In Common Pleas elections all the judges were reëlected in 1916 and 1920, but in other years the record has been almost the reverse.

When one considers the broad outlines of the situation in Cleveland and realizes that the necessary fundamentals for a splendid administration of justice were largely at hand, that by virtue of superior organization and technique her courts were in a position to render conspicuous service to the community through prompt, efficient, and vigorous enforcement of the laws, and that her past record for carrying through large judicial reforms gave promise of a continuing progressive development, it comes as a rude shock and a bitter disappointment to find that in actual operation during the past years this system has been grossly abused and the opportunities wasted almost beyond recall. Because inherently it had such fine possibilities, the actual breakdown of Cleveland's administration of the criminal law is a tragedy.

The Defects and Evils in the Present System

Disrespect for Law

It has already been stated that of the fundamental factors requisite for a decent administration of justice the underlying and basic element is a sound tradition of respect for law. The most perfect court system could not function long unless it were supported and sustained by good citizenship.

There are distressing signs that Cleveland has been in the throes of reaction and that from the pinnacle of a highly developed sense of civic responsibility she has fallen not merely to the general level, but into depths of apathy and indifference far below. Concrete proof of such an indictment cannot, in the nature of things, be easily afforded except as its truth is recognized and admitted by leading citizens of Cleveland themselves. But to the outsider there are certain objective manifestations which indicate that a deteriorating influence has been at work.

The public plays a direct part in the administration of justice at elections, by jury service, and through the facilities it grants to the courts,

and exercises an indirect, but no less important, influence through an enlightened public opinion which recognizes and sustains what is good and vigorously condemns what is wrong.

When civic pride was strong, Cleveland built her County Court House and City Hall, which afford dignified and adequate accommodations for certain of her courts. Since then the needs of the courts have been given little heed. The Common Pleas Court is forced to work disjointedly and wastefully in two separate buildings, and two of its courtrooms are hardly suitable. The criminal sessions of the Municipal Court are carried on under conditions which are a disgrace.

The jury system, despite its improvement since 1915, remains a constant and most dangerous source of weakness in the judicial system. This is not essentially due to faulty technique in calling or selecting the jurors, but is due to the plain fact that the citizens avoid service in a wholesale manner unheard of in most jurisdictions. It is hard to believe, but it is nevertheless a fact that in Cleveland a citizen may buy immunity from jury service for a nominal sum by contributing to a military organization. For such a condition no condemnation is too severe. The State of Ohio should take to heart the lesson taught by the selective service acts in the Great War that the responsibilities of citizenship in a democracy are not matters for barter and sale.

The giving of false testimony under oath seems to be rife in an unparalleled degree. While the blame for wide-spread perjury attaches in first instance to the public's officials for their failure to cope with it, the final responsibility for this condition which makes a mockery of the processes of law must be laid at the door of a community which produces so many persons willing to violate their oath and which, after it has become fully aware of the situation, goes on about its other business indifferent and unconcerned, tolerating the fact that of 27 persons charged in one year with this and kindred crimes, only one was brought to punishment.[1] Through the centuries the finger of scorn has been pointed at Nero fiddling while Rome burned, but what shall be said of a community which, engaged in private gain, allows the spirit of perjury to stalk unrestrained through its halls of justice?

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[1] Since this sentence was written, concrete proof of what a community, under proper leadership, can accomplish through the force of public opinion has been afforded. After McGannon, former Chief Justice of the Municipal Court, was acquitted on the charge of first-degree murder, he and others who were witnesses at the trial were indicted for perjury as a result of a determined public opinion and wise Bar Association action, and on this charge he was convicted.

Evils in Organization

Turning to matters of organization and system, it is apparent that Cleveland, in common with other cities, suffers from an antiquated and cumbersome criminal procedure utterly unsuited to the modern conditions of her industrial urban life. This produces maladjustment, waste, and friction; it places enormous handicaps on society in its effort to defend itself from criminals. Admitting that the protection of the innocent man, unjustly accused, is the most important single consideration, it is still true that his interests and the interests of the community would best be served by a system of few, simple, effective safeguards and checks which would operate equally in all cases. For the average man, and certainly for the man without funds or friends, it would be safer to have one trustworthy refuge, like the cat in Æsop's fable, than to have a score of possible escapes, none of which may work. In the fable the fox was caught, but in Cleveland, if he were a professional fox, he would be very likely to escape.

The evil of this overcomplicated system is that it has become unwieldy. It gets enmeshed in its own technicalities and defeats its own purpose. It fosters and makes possible the "professional" criminal lawyer, who finds it worth while to test and tamper with it until he discovers the weak spot through which his client may escape. The system may guarantee immunity for innocence, but it tends also to guarantee immunity for crime. The prosecutor is at a disadvantage before the professional criminal represented by the "professional" criminal lawyer, who can gain victory in any one of eight ways: by a police discharge after arrest, by a "nolle pros" or discharge after preliminary hearing in the Municipal Court, by the grand jury's failure to indict, by "nolle pros" in the Common Pleas Court, by acquittal before the jury, by the granting of a new trial, or by a bench parole. Outside of this curriculum, the system engenders delay, and if enough delay can be gained, the case may have to be dropped for lack of prosecution. Or, finally, as a last resort, bail may be forfeited and the criminal leave for parts unknown. In the retinue of the professional criminal lawyer is the professional bondsman, who is a "runner" in odd moments, and who stands surety on bail bonds aggregating a sum big enough to stagger a surety company,[1] but which occasions him little concern, for he feels quite confident that suit will never be brought to enforce any of the bonds.

The judges are not responsible for this archaic procedure, but in-

[1] The so-called Day Bill, already referred to, limits the number of bonds, and this very recent law, if properly enforced, should entirely change this situation.

stead of trying to make the best of a bad situation, they have made it worse. They cannot be held entirely accountable for failing to check the extensive "nolle prossing" of cases by the prosecuting attorneys, because they have no independent source of information to enable them to act with discrimination, but they are open to severe censure for their laxness with regard to continuances and their abuse of the right to a new trial.

In both courts the passing or continuing of cases is badly handled. The cumulative effect of the delays thus obtained in many instances is to make the case become so stale that no one wants to prosecute it and no witnesses are left with which to prosecute it. Apparently, if the defendant's lawyer can drag a case along for over sixteen weeks, the law of averages will do the rest. As an average proposition in Cleveland, unless the State can bring a criminal to trial within one hundred and fifteen days his case will be "nolle prossed" or discharged on motion or dismissed for want of prosecution.

It is shocking to the sense of a lawyer to learn how the judges grant new trials for purposes utterly distinct from the solemn purpose for which the right to new trial is embodied in our law. The power of the court to grant a new trial exists to prevent gross miscarriage of justice, as where newly discovered evidence indicates the serious possibility of error or where the judge feels bound by the oath of his office to countermand the jury's verdict as being contrary to the law or the evidence. Instead of keeping this high prerogative of justice inviolate, it has been prostituted apparently for the purpose of allowing individual judges to work out their individual ideas as to the proper disposition of a case. To grant a "new" trial when there has been *no* trial because the defendant pleaded guilty is an abuse of judicial power. To grant a new trial after a conviction for a definite offense, with no idea of having a new trial, but in order to accept a plea of guilty for a lesser offense, is usurpation of power. This is not administering justice according to law, and judges who thus depart from their plain duty must expect to have their motives attacked and to encounter a diminished respect for themselves and their office.

Similarly, the judges of the Municipal Court who allow "motions in mitigation" and then retract or reduce sentences imposed after a finding of guilty are rapidly undermining public confidence in the integrity of the legal system. This "motion in mitigation" is an anomaly. After the determination of guilt, a judge should impose sentence only after he has decided what is just, and having made the decision, should abide by it. A judge who sentences a man before he has made up his mind

and a judge who cannot make up his mind are both unfit for judicial office.

It would seem that the decadence of the general public spirit had affected the judges and sapped their spirit of courage and independence. Perjury committed in open court has passed without challenge. A lying witness should be stopped short and warned, and failure to heed the warning should be summarily punished by imprisonment for contempt. In the case of Bar Association v. Sleeper, a recent proceeding against an attorney in Massachusetts, the Justice of the Supreme Judicial Court who heard the case became convinced that the defendant was deliberately giving false testimony and disbarred him. This is, perhaps, an extreme illustration but it serves to demonstrate how much a fearless and strong judiciary can do, and on occasion ought to do, in sternly repressing the ever-present menace of perjury.

The judges have been entirely too free in granting paroles, but the real difficulty here is that Cleveland has provided the Municipal Court with a grossly inadequate probation force and the Common Pleas Court with no probation staff at all. A strong probation force of character and intelligence is universally recognized as an indispensable auxiliary department of a modern criminal court. Nearly everywhere the principle of effective probation work is established, but Cleveland is in this respect a decade behind other cities and is paying the penalty. In Cleveland the fact is ignored that the criminal courts exist not only to separate the guilty from the innocent, but to segregate out from among the guilty those who are professional criminals in order to restrain them. In the warfare which society must continually wage against crime, the courts are the outposts. The criminal who breaks through or escapes from that first line of defense cannot be apprehended until *after* he has committed another crime. In the absence of the intelligence service which a trained probation force can supply, the courts cannot and do not deal effectively with the habitual criminal. Cleveland has become known to the underworld as a snug harbor and she pays dearly for this unenviable reputation, as the fast mounting record of arrests for felonies bears witness.

It is perhaps not surprising that a system which tolerates these abuses should rush to the opposite extreme and deal harshly with persons who are not criminals and are not even accused of crime. In Cleveland today men who are needed as witnesses and whose only fault is poverty are put in jail and kept in jail for weeks and months. Except in most unusual circumstances, to deprive a man of his liberty in this way is a downright outrage. A bench, a bar, a community too callous to rise in pro-

test against such a practice, even if it be rare, must have forgotten or lost in marked degree the instinctive American sense of fair play.

The business of the courts is not transacted with the dignity and decorum demanded by the seriousness of their work. Disorderly conduct among witnesses and spectators that calls for sharp reprimand is not checked. The attitude of respect and reverence is so dependent on proper physical surroundings that inevitably there is least dignity in the criminal sessions of the Municipal Court, which are held in unclean, untidy, ill-arranged rooms. Here come the first offenders and immigrant offenders and here they receive their first impression of the majesty of the law. A justice of the Supreme Court of the United States could not long maintain dignity in such quarters, for no nervous system can withstand the pressure of such an environment.

The clerk's office of the Municipal Court for criminal business is not better accommodated and doubtless this fact accounts in large measure for the inaccuracy and inadequacy of the records and for the disorderly state of the lists.

Personnel: Politics

The average quality of the personnel of the judiciary is not as high as is needed for a proper administration of justice. There are judges sitting who ought not to be on the bench in Cleveland or anywhere else. The morale, or what lawyers would call the "tone," of the bench is weak.

While it may be true that the judges of the Common Pleas Court are not markedly inferior to the general caliber of judges chosen elsewhere by the methods of popular election now in vogue, this standard of comparison is not high enough to afford ground for much reassurance. In the Municipal Court, where the disintegrating forces seem first to have had their effect, the situation is worse, and Cleveland has very recently been forced to oust from this court one judge who was bringing opprobrium on the entire bench.

This condition is due partly to the comparatively short tenure of office, but it is primarily and chiefly attributable to the method by which the judges are selected.

Presently we must consider how far it is true that popular election of judges is at the root of most of the trouble in Cleveland on the ground that such a method is bound to produce inferior judges. But even assuming for the moment that the people may, under proper circumstances, select their judges wisely, it is obvious that the particular method employed in Cleveland, despite certain good features, is operating badly.

The short tenure requires the judges to campaign frequently, and as they always have to face vigorous competition, they are forced to cam-

paign strenuously or risk retirement. Thus, the most damaging and most dangerous features of the elective method are not only given full play but are intensified. In the course of such electioneering the judges are forced to speak and act in a manner inconsistent with and repugnant to any decent conception of judicial office. With the bogey of reëlection constantly hovering in the foreground, the covert pressure exerted by groups and organizations cannot be disregarded as it should be. The political lawyer, with his control of votes, becomes a man of importance, to be placated if possible. As his potential competitors at the next election who are off the bench are continually striving to create and develop their own influence in the community, the judge on the bench must do likewise. He must become known, his name must be seen in the papers, and therefore he gets an assignment to sit in the criminal sessions of the court because criminal cases have superior news value. The doing of justice forbids the granting or receiving of favors, but in an open election the judge must beg for votes and, after he has lost his private practice through years of service on the bench, he must beg hard. It is next to impossible to make an effective political speech without at least impliedly promising something to somebody. Such conditions destroy scruples and cause a progressive deterioration from bad to worse, so that in Cleveland today we find judges permitting the solicitation of campaign funds from lawyers who practise before them and the insertion of large paid advertisements of themselves in the papers. In one instance, a judge has assumed to administer justice in a court-room adorned with political placards urging all those in attendance to vote for him.

The method of selecting judges now obtaining in Cleveland puts a premium on self-advertisement and compels the currying of favor. It is thoroughly bad. Its immediate correction is a problem of outstanding importance.

Suggestions and Recommendations

In the preceding pages an effort has been made to point out the more important defects in Cleveland's administration of criminal justice, and it is now in order to consider what definite, feasible, constructive things may be done to eliminate or abate these evils. Recommendations as to many details are contained in the main report in their appropriate places; it is attempted here to present only those suggestions which, by reason of their larger import, call for special attention and discussion.

There is no panacea for the existing ills nor is there any royal road to democratic self-improvement. These suggestions will not bring

about the millennium, but they are respectfully offered in the firm belief that their adoption will effect substantial and genuine improvements.

As to Personnel

The needed improvement in personnel cannot be effected by lopping off a head here and there and trusting to luck for the future. The only permanent way to secure better judges is by devising a better method for selecting them and keeping them after they have been selected.

It is the consensus of opinion of the bar and the unanimous conviction of the ablest students of our legal institutions that strong and well-qualified judges are most certainly secured when they are appointed by the Executive and hold office for life, subject, of course, to removal for misconduct. On the evidence, there is every reason to believe that this method of selection, or a modification of it, plus long tenure, would do more than anything else to revolutionize the present state of affairs. If it be within the field of possibility, this is unquestionably the goal to be striven for. On the other hand, one cannot ignore the fact that in this matter, as in matters affecting standards of admission to practice, the bar does not seem to possess public confidence and is unable to gain acceptance of its views. On this point there is a gulf of misunderstanding between laymen and lawyers that has not been bridged. The body of the people seem determined to retain the power of selecting their judges, and wherever that is so, the only practical step is to make the elective system operate at its maximum possible efficiency.

Within the limits insisted on by the democratic impulse, much can be done. Almost every conceivable method of selecting judges has been tried in the various States and, as Dean James Parker Hall made clear in his address before the Ohio Bar Association in 1915, each method can point to a success in some State. As an extreme illustration, judges are elected in Vermont by the legislature for two-year terms. Theoretically this is as bad a plan as could be devised; but actually in Vermont good judges are chosen and hold office for life. Popular election of judges has done splendidly in Wisconsin, where the tradition has grown up of steadily reëlecting the judges.

The secret in obtaining good judges is that back of the method—whatever it is—there must be a tradition which makes the selecting group realize that it is clear public policy to retain judges in office except for grave mental, moral, or physical defects. This tradition has been built up in New York, Wisconsin, Vermont, Connecticut, and elsewhere, but seems not to exist in Cleveland (with the exception, strangely enough, of the Probate Court), and it cannot be secured overnight. Its growth may, however, be aided.

To that end the following principles should be incorporated into the elective system, if that is to be retained in Cleveland. Judges in first instance should be elected as they are now. Their first term should be comparatively short, say, six years. At the end of that time they should run for reëlection for a longer term of, say, ten or twelve years, and for this purpose they should run *against their own record,* not against a motley group of other candidates. In other words, the voters decide a plain issue: Shall the judge be retired or shall he be retained? The third term should be even longer and consist of, say, twenty years. In the event of the retirement of a judge a special election, in which he could not be a candidate, would be held.

Such a plan will reduce very greatly the amount of electioneering and the constant interruption of judicial work thereby occasioned. For a judge to run against his own record is infinitely less degrading than the scramble for votes in the open field. The question of reëlection or retirement will be an issue of moment and on it all the responsible agencies in the community can focus their attention.

The tendency will clearly be to retain judges in office; the average tenure will be substantially longer. The enormous advantage of the longer tenure is this: There is a splendid tradition of service, the heritage of centuries, which attaches to the judicial office and which elevates every man who takes the oath of that office. This tradition, constantly at work, plus the experience gained as the years go by, takes inferior men, if need be, and develops them into superior judges.

The method suggested in no respect deprives the community of its right to select its own servants and to discharge those with whom it is dissatisfied. For that reason it is a feasible method. And, as it is calculated to make the method of popular election operate at maximum instead of mediocre efficiency, it would give results.

It is pertinent to ask whether the elective method has ever had a fair chance to demonstrate how much it could do. For the determination of all other questions by popular vote the tremendous organization and work of the political parties is required. Without them all voting would be blind. In judicial elections, partisan activities have quite properly been eliminated. This tends to leave the voters entirely in the dark, to be enlightened only by the mirage of cheap publicity. Democracy demands responsible leadership. Under the suggested plan, wise leadership is the only hope for securing competent judges in first instance. It may well be that the most effective guidance would come from the party heads, the bar, and perhaps representatives of other organizations acting in concert to decide upon and support the best available candidates; but

here, as in all judicial issues, the predominating influence should come from the bar. A hitherto disorganized bar which has not taken itself seriously cannot wonder that the public has declined to follow its weak leadership. But there is every reason to believe that a well-integrated bar, such as is now taking shape in Cleveland, conscious of its public obligations, would build up a record of public service by keeping its own house in order and, by promoting the better administration of justice, would win the public respect and confidence which underlie the acceptance of leadership. It must be remembered that despite all the hue and cry and jokes about the profession the individual man will, when the occasion arises, place absolute confidence in the individual lawyer. Were this not so the legal business of the community would have been taken out of the hands of lawyers long ago. But for leadership the bar must act collectively, and until recently the bar has not felt the sense of its own solidarity or the sense of its responsibility as a group.

The Cleveland Bar Association is today in many respects one of the best associations in the United States. It should continue along the lines of its present development. In the selection of former Judge McGannon's successor its voice was heard and heeded. The above outlined plan would give it a real opportunity to throw the full weight of its combined influence in the right direction as the issues of election and reëlection of judges come before the people.

As to Organization

In considering recommendations for improved organization it must be remembered that system is a servant and not a master. Good men can give good government despite the handicap of weak organization. Bad men can produce nothing but bad government no matter how efficient the system may be. In judicial affairs system exists for the same purposes and plays exactly the same part as in business affairs. It is designed to make work more efficient by eliminating waste effort and friction, to afford those records which make possible unified control and wise direction through an executive head, and to secure and compile the facts as to the undertaking, its assets and liabilities, which yield the needed information for the guidance of the public.

1. In organizing itself promptly to detect and adequately to restrain the criminal, it is plain common-sense strategy for the community to marshall all its forces in one court. A unified court for the transaction of all criminal business, as has been established in Detroit, is strongly recommended because it is bound to be superior to split jurisdictions, divided responsibility, and uncoördinated effort.

To accomplish this result in Cleveland a *new* court is not needed: all the criminal business of the Municipal Court can be transferred to the existing (and additional) sessions of the Common Pleas Court.

If this entire step is not deemed immediately practicable, then the next best thing is to transfer to the Common Pleas Court *complete* jurisdiction over felonies by taking out of the Municipal Court the preliminary stages and the preliminary hearing. This would at once eliminate the worst duplication in the present system and would relieve the Municipal Court judges, who now have entirely too many cases to be able to give them proper attention.

The Common Pleas Court should be given a thoroughly modern form of organization, with complete power to make its own rules of procedure and control its own business, under the supervision and leadership of a permanent Chief Justice. The present plan of rotation has all the weaknesses of the old Roman plan of two consuls alternating in power. Definite responsibility is nowhere. The essential importance of this form of organization will steadily be seen in connection with subsequent recommendations.

2. Provision should at once be made for the establishment of an adequate probation staff, including medical advisers, either for a unified court or for both the present courts. The personnel should be appointed by the Chief Justice or respective Chief Justices to hold office during good behavior. To the probation force should be committed the task of collecting fines, non-support orders, and the technical custody of persons adjudged guilty who need actual supervision but not imprisonment. The courts should have power simply to put the case on probation, or to impose sentence, suspend sentence, and put the defendant on probation; for breach of the terms of probation the punishment is the automatic execution of the original sentence. The details for the organization of the staff should be worked out by a committee of the Bar Association in conference with the National Association of Probation Officers.

3. The abuse in the granting of new trials and continuances cannot wisely be stopped by depriving the court of all power to order any new trials or continuances. Such matters must always be left to the sound discretion of the judges. But the disastrous tendency toward laxness and carelessness in the exercise of this discretion, as well as personal laziness, which is the product of the present loose, irresponsible organization in the Common Pleas Court and the demoralization of the organization of the Municipal Court, can be speedily curbed by the determination of a Chief Justice who can get at the facts and call on an offending judge for an explanation. A thoroughgoing system of records, such as

obtains in the New York City Magistrates' Court, will enable a Chief Justice to detect promptly and to stop such abuse of judicial power. And in this task the Chief Justice should have the coöperation of a Bar Association committee on the administration of justice which can, through a professional secretary, keep its own vigilant watch on the situation.

4. Further safeguards should be thrown about the use of the *nolle prosequi*. The motion should be filed like any other motion, and should specify the prosecutor's reasons for declining to prosecute. This change should be effected by rule of court, and it should always be in the courts' further discretion whether the complaining witness should be notified and whether there should be general notice by publication.

It would clear the prevailing atmosphere if the court should immediately promulgate a rule providing (1) at least seven days' notice to the complaining witness and the Bureau of Criminal Identification of the filing of every such motion, and (2) definite days for the hearing and determination in open court of such motions. This rather rigid rule of procedure could be altered when circumstances altered.

5. The practice of jailing complaining witnesses in default of bail should be abandoned. Such witnesses should be released on their personal recognizance except in cases where the Chief Justice or acting Chief Justice orders otherwise for cause shown at a hearing in which the witness is represented by counsel. As, by hypothesis, these persons are indigent they must be afforded counsel at public expense.

6. The assigned counsel system should give way to the more modern, more efficient, more economical "public defender" system. The greater success attending the assignment of all cases of all accused poor persons to one central responsible agency has been demonstrated in Los Angeles. The legislature of California, in its last session, made provision for extending this system throughout the State. Because of the generally upset conditions in Cleveland it is recommended that, for the time being at least, this work be entrusted to quasi-public, rather than public, hands. The precedent of the New York Voluntary Defenders' Committee is applicable. To accomplish this improvement neither a statute nor an appropriation is required. The work of representing poor persons in criminal cases is so closely analogous to the work of representing poor persons in civil cases, now undertaken by the Legal Aid Society, that the two functions should be combined in one agency, as has been done in New York. This one legal aid organization should be created, supervised, and controlled by a special committee of the Bar Association which is the properly responsible body. Having available such an organization,

the courts could, and, if the organization merited confidence, would assign to its attorney, in charge of its criminal work, all the cases now entrusted to assigned counsel. In view of the general experience throughout the country it would be surprising if a budget of $32,500 (the cost of assigned counsel in 1920) did not enable such an organization to handle 528 cases, of which only 194 required trial, more efficiently and justly than they are now handled. To this quasi-public defender office the Municipal Court judges could refer cases when, in their opinion, the defendants needed counsel for a fair trial. This office would, in cooperation with the probation staff, be of material assistance in securing that information which the court needs to arrive at a just sentence. Finally, such an organization, through its constant contact with the criminal work of the courts and through its reports, would be the sort of guardian and watcher which is essential if the public is to be kept intelligently informed of what goes on in its legal institutions.

7. The provision of law exempting citizens from jury duty for contributing to military organizations should be repealed forthwith.

8. Whether or not the seemingly useless method of indictment by grand jury should be retained is only a part of the major problem of the reform of our whole criminal procedure. Our criminal procedure everywhere lags behind the civil. The only available safe path of progress seems to be the step by step process of constant experimentation, revision, and adaptation. Such work calls for a Judicial Council, a perpetual body, consisting of not less than five and not more than 15 judges and lawyers appointed by the Chief Justices and holding office during their pleasure. If a Judicial Council can be secured, it is of minor importance whether that body has rule-making power or merely advisory power. A Judicial Council, which is a permanent commission on judicature, serves to connect up all the parts of the judicial system which, for many reasons, it is impossible to coördinate through amalgamation. As it affords a clearing-house of ideas, it becomes the advisory steering committee for the judicial business as a whole. Roughly, it is analogous to the board of directors in a large industrial company. The growing realization that only through some such body can our courts be brought up to date *and kept up to date* is well attested by the fact that the Massachusetts Judicature Commission in its 1921 report emphasizes the need for a Judicial Council as its cardinal recommendation. The conferences which are now held in Cleveland from time to time between representatives of the Bar Association and the judges constitute a laudable step in this direction.

The recommendations of a Judicial Council would be worked out in coöperation with other agencies in the community and would be presented to the courts, the bar, the legislature, or the public, as the case might be. Its recommendations would have the supreme merit of being based on a *continuous* study of the administration of justice. This is the converse of the method heretofore followed in America. The community has paid exclusive attention to its business affairs and has left its institutions to care for themselves, to stagnate, to be outgrown, or to become archaic as the life which these institutions were supposed to regulate rapidly altered its character and complexion in every particular. Periodically, when conditions became absolutely unbearable, a momentary attention would be given to the matter, a wave of reform would sweep the community, changes would be made with pathetic confidence that at last perfection had been attained, then interest would wane, the current of our national life would sweep swiftly on, growing, altering, and developing, and in a few years the whole process would have to be repeated. If all the recommendations herein made had the power to give Cleveland a perfect administration of justice and were adopted tomorrow, in ten years' time the courts would again show signs of breaking down. This is inevitable. Law regulates life. Life is constantly in flux and it will break down any static organization. To keep our legal institutions abreast of the times the formation of a Judicial Council is earnestly recommended.

9. Assuming that the Municipal Court is to retain a portion of criminal jurisdiction, then steps should be taken to recognize the fact that it is a court of equal dignity, responsibility, and importance with the Court of Common Pleas. It is not an "inferior" court, nor does its business consist of "petty" cases. In its work for the prevention of crime and the inculcation of respect for our institutions, it is the supreme court in importance if not in rank. The judges of the Municipal Court should be selected under the plan earlier suggested; and they should be paid as much as the judges of the Court of Common Pleas.

10. The city should at once furnish not merely decent but really suitable accommodations, so that the criminal sessions and the criminal division of the clerk's office may be housed in a manner compatible with the dignity of their work.

The system of clerks' records should be modernized. Primarily the ledger or docket system should be employed, and on the page assigned to each case (entered numerically and cross-indexed alphabetically) all the facts in the history of the case should be entered. Through the use of standardized headings, which is easily possible because all cases follow

the same general routine, it then becomes feasible without enormous labor to draw off and compile those general controlling facts and tables which enable a Chief Justice actually to be an executive head and which the public are entitled to have interpreted and reported to them through court reports and the press. Although the detail of a clerk's office must be left to the clerk, it is important that the process of revising should get down to details and that all such slack practices as the stamping of *both* judges' names on the docket—which is nothing more or less than a false record—should be eliminated.

11. The elimination of the "shyster" lawyer who gets his cases through "runners" is difficult. Of all methods that have been tried, the work of the public defender in Los Angeles is the most efficacious and, therefore, if a proper quasi-public defender office is established in Cleveland, it is reasonable to suppose that the nefarious business of the "runners" may be curtailed to the point where it will no longer be profitable. The "shyster" lawyer, in so far as he transgresses the law or the ethics of the profession by solicitation, must be dealt with by the Bar Association.

12. This evil, as well as that of the professional bondsman, can automatically be further reduced by the proper use of the summons instead of an arrest in cases involving minor offenses and violation of city ordinances.

13. The peculiar proceeding used in the Municipal Court called the "motion in mitigation" has no place in a proper administration of justice and should be abolished.

Civic Responsibility

A persistent effort has been made in all these pages to bring home the fact that the tradition of respect for law and of civic pride in our legal institutions is by far the most compelling force for justice. Tradition is our heritage of social experience. It is the conscience of the group, and it affects every citizen, every witness, every lawyer, every judge in the community. Like conscience, it becomes dulled through scorn and neglect.

Cleveland's traditional spirit and sense of civic responsibility must be awakened. Brass bands will not do it, but through education and the actual undertaking of work for the public much good may be accomplished. Let the leaders of the community lead. There are at least two points where an immediate attack may be begun. If the public conscience refuses to condone perjury, convictions will follow. Extended perjury cannot exist without some lawyers taking some part in it. A lawyer who knowingly permits perjury to be committed in court is a false

minister of justice and it is the duty of the Bar Association to disbar him. Jury service must become again an accepted civic responsibility. It might serve the purpose for the Chamber of Commerce, the Civic League, the labor unions, and other organizations professing an interest in public welfare to compare jointly their membership lists with the lists of the jury commissioners to determine how many of their members fail to qualify for jury service and why.

No outsider can hope to do more than to try to point the way. For all these recommendations there must be supplied by Cleveland men those details which are always required for the successful adaptation of general principles to particular local conditions.

Here is a definite call for immediate, practical public service. To study, digest, and weigh these recommendations requires patient, self-sacrificing effort, and actually to apply those which commend themselves will require courage and persistent effort. If this task is earnestly undertaken by the communtiy, it may be that from the very undertaking will begin a resurgence of the tradition of civic pride that in former years gave Cleveland her preëminence.